TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 81.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

NATHAN L. MILLER, AS COMPTROLLER OF THE STATE OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED AUGUST 16, 1904.

(19,444.)

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a Court of Appeals.

STATE OF NEW YORK, *ss*:

Pleas in the Court of Appeals Held at the Capitol, in the City of Albany, on the 13th Day of January, in the Year of Our Lord One Thousand Nine Hundred and Three, Before the Judges of said Court.

Witness, the Hon. Alton B. Parker, chief judge presiding.
W. H. SHANKLAND, Clerk.

Remittitur, January 14th, 1903.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of the New York Central and Hudson River Railroad Co., Appellant-Respondent,

ag'st

ERASTUS C. KNIGHT, as Comptroller of the State of New York, Respondent-Appellant.

Be it remembered, that on the 31st day of October in the year of our Lord one thousand nine hundred and two Erastus C. Knight, as comptroller of the State of New York, the respondent-appellant in this proceeding, came here into the court of appeals, by Hon. John C. Davies, attorney general, his attorney, and filed in the said court a notice of appeal and return thereto from the order & judgment of the appellate division of the supreme court in and for the third judicial department.

b And afterwards, The New York Central &c. Railroad Company, relator, appellant-respondent in said proceeding, afterwards appeared in said court of appeals by Ira A. Place, its attorney and also filed a notice of appeal from the aforesaid order & judgment.

Which said notices of appeal and the return thereto filed as aforesaid, are hereunto annexed.

Whereupon, the said court of appeals, having heard this proceeding argued by Mr. Ira A. Place of counsel for the appellant-respondent, and by Mr. Henry B. Coman, deputy attorney general, of counsel for the respondent-appellant, and after due deliberation had thereon, did order and adjudge that the order of the appellate division of the supreme court appealed from herein be, and the same hereby is modified as indicated in the opinion of Haight, J., and proceedings remitted to the comptroller to assess the tax accordingly, without costs to either party.

And it was also further ordered, that the record aforesaid, and the proceedings in this court, be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be and the same hereby is modified &c. &c. as aforesaid.

And hereupon, as well the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record
c now remains in the said supreme court before the justices thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, January 14th, 1903.

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said proceeding in the court of appeals, with the papers originally filed therein, attached thereto.

[SEAL.] W. H. SHANKLAND, Clerk.

d In the Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of the New York Central and Hudson River Railroad Company
against
ERASTUS C. KNIGHT, as Comptroller of the State of New York.

Papers on Appeal from Order.

Ira A. Place, attorney for appellant-respondent, Grand Central station, borough of Manhattan, N. Y. city, N. Y.

John C. Davies, attorney-general, attorney for respondent-appellant, capitol, Albany, N. Y.

1 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of the New York Central and Hudson River Railroad Company
against
ERASTUS C. KNIGHT, as Comptroller of the State of New York.

Notice of Application for an Order for a Writ of Certiorari and for Writ.

SIR: Please take notice that a motion will be made by and on behalf of the New York Central and Hudson River Railroad Company, at a special term of the supreme court in and for the county

of Albany, to be held at the city hall in the city of Albany, N. Y., on the 16th day of November, 1901, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order for a writ of certiorari, and also for a writ of certiorari, to be directed to you, to review the determination of the comptroller of the State of New York, dated September 13, 1901, a copy of which is hereto annexed, to be returnable according to law, and for
2 such other and further relief as may be proper.

Dated New York, October 10, 1901.

Yours, &c.,
IRA A. PLACE,
Attorney for Applicant, The New York Central and Hudson River Railroad Company, Room 417, Grand Central Station, Borough of Manhattan, New York City, N. Y.

To Hon. Erastus C Knight, comptroller of the State of New York, Albany, N. Y.

3 STATE OF NEW YORK:

COMPTROLLER'S OFFICE,
ALBANY, Sept. 13, 1901.

In the Matter of the Application of NEW YORK CENTRAL & H. R. R. R. COMPANY for a Revision and Resettlement of Taxes Assessed Against it under the Provisions of Chap. 908, Laws of N. Y. 1896, and the Several Acts Amendatory Thereof.

An application having been made by the above-named New York Central & Hudson River R. R. Company for a revision and resettlement of the taxes assessed and determined against it by the comptroller of the State of New York for the year ending Oct. 31, 1900, and the said comptroller having heard proofs offered on behalf of the said New York Central & Hudson River R. R. Company, in support of said application, and after due consideration thereof, the comptroller does determine that the assessment heretofore made against the said New York Central & Hudson River R. R. Company does not include taxes which could not have been lawfully demanded, and, therefore, declines to make any revision or readjustment of the same.

(Signed) THEO. P. GILMAN,
Deputy Comptroller.

4 At a special term of the supreme court court held in and for the county of Albany, at the county court house in the city of Albany, N. Y., on the 16th day of November, 1901.

Present: Hon. D. Cady Herrick, justice.

9 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of the New York Central and Hudson River Railroad Company *against* ERASTUS C. KNIGHT, as Comptroller of the State of New York. } Petition for Writ.

To the supreme court of the State of New York:

The petition of the New York Central and Hudson River Railroad Company respectfully shows:

I. This petitioner, The New York Central and Hudson River Railroad Company, is a domestic railroad corporation, having but one kind of capital stock, organized and existing under the laws of the State of New York, for steam surface railroad purposes, and is engaged in operating certain railroads owned or leased in the State of New York and certain railroads leased in other States, and was such railroad corporation during the year ending October 31, 1900.

II. The defendant, Erastus C. Knight, is and has been since January 1, 1901, the comptroller of the State of New York.

III. That on or before November fifteenth, 1900, this petitioner duly made a written report to the comptrolier of the State of New York, as required by subdivision 1 of section 189 of the tax law of the State of New York, being chapter 908 of the Laws of 1896 of the State of New York.

IV. That the said report showed the condition of this petitioner at the close of its business on October 31st preceding, and stated the amount of its authorized capital stock to be $115,000,000; that the amount of stock paid in up to April 1, 1900, was $100,000,000; that the amount of stock paid in on and after April 1, 1900, was $115,000,000; that the date of payment of each dividend declared by it during the year ending with said 31st day of October was as follows: January 15, April 16, July 16, October 15, 1900; that the rate per centum of each of the said dividends was five per centum; that such dividends amounted to less than six per centum on the par value of the capital stock of this petitioner; that the entire amount of the capital of such corporation, this petitioner, was $338,897,656.69; and that the capital employed by such corporation, this petitioner, in this State during the year ending said October 31, 1900, was $204,587,574.76; and that the capital employed by such corporation, this petitioner, outside of the State of New York, during such year was $134,310,081.93; that is, the proportion or percentage of capital employed by it within this State was sixty and thirty-seven one-hundredths (60 37-100) per cent. of the entire amount of its capital, and the proportion or percentage of capital employed by it outside of this State was thirty-nine and sixty-three one hundredths (39 63-100) per cent. of the entire amount of its

capital; and that therefore, from November 1, 1899, to March 31, 1900, both inclusive, $60,370,000 was such portion of the capital stock at par of such corporation, this petitioner, as the amount
11 of capital employed within this State bears to the entire capital of the corporation; and that from April 1, 1900, to October 31, 1900, both inclusive, $69,425,500 was such portion of the capital stock at par of such corporation, this petitioner, as the amount of capital employed within this State bore to the entire capital of the corporation.

V. That subsequent to the said fifteenth day of November, 1900, the said comptroller audited and stated the account for taxes to be paid by this petitioner under section 182 of the tax law, and sent notice thereof to this petitioner.

VI. That the account so audited and stated was in the words and figures following, to wit:

"COMPTROLLER'S OFFICE, ALBANY, N. Y.

The N. Y. Central & H. R. R. R. Co., Grand Central Station, N. Y. C.

G. S. Prince in Account with the State of New York, Dr.

For tax on franchise or business, based on value of capital stock employed in New York State, per chapter 908, Laws of 1896, and acts amendatory thereof, for the year ending October 31, 1900, as per report filed.. Appraised value of capital stock, $106,000,000, tax 1½ mills..... $159,000.00

(Return this bill to the comptroller, with draft or check payable to State treasurer.)

The tax specified is due and payable January 15th, 1901. Interest attaches after that date."

VII. That on or about the 30th day of January, 1901, and within one year from the time that the said account had been audited and stated, and notice thereof sent to this petitioner, this peti-
12 tioner applied to the said comptroller to revise and readjust the said account and to have said account resettled by striking therefrom, or by crediting to the account of this petitioner, the sum of $60,521 46; that the said application was made by written petition, duly verified on or about the 30th day of January, 1901, and entitled "In the matter of the application of the New York Central and Hudson River Railroad Company for a revision and readjustment of the account heretofore audited and stated by the comptroller of the State of New York for taxes under section 182 of the tax law, for the year ending October 31st, 1900;" that upon such application said comptroller, on or about the 5th day of April, 1901, granted a rehearing, and fixed the first day of May, 1901, as the day upon which the petitioner might be heard upon such application; that said hearing was duly adjourned to the 15th day of

July, 1901; that on the said 15th day of July, 1901, this petitioner duly appeared by its counsel before the Honorable Willis E. Merriman, the deputy comptroller, representing the said comptroller, and gave testimony in support of the said application; that upon said hearing it appeared from the revised and corrected figures that of the said sum of $338,897,656.69, the entire amount of the capital of said corporation, this petitioner, as aforesaid, $205,029,380.45 was capital employed by it within this State during such year, and $133,868,276.24 was capital employed by it outside of this State during such year; that is, the proportion or percentage of capital employed by it in this State was sixty and fifty one-hundredths (60 50/100) per cent. of the entire amount of its capital, and the proportion or percentage of capital employed by it outside of this State was thirty-
13 nine and fifty one-hundredths (39 50/100) per cent. of the entire amount of its capital; and that therefore from November 1, 1899, to March 31, 1900, both inclusive, $60,500,000 was such portion of the capital stock at par of such corporation, this petitioner, as the amount of capital employed within this State bore to the entire capital of said corporation; and that from April 1, 1900, to October 31, 1900, both inclusive, $69,575,000 was such portion of the capital stock at par of such corporation, this petitioner, as the amount of capital employed within this State bore to the entire capital of the corporation; that thereafter the said comptroller made his determination, and sent written notice of his determination upon said application to the applicant, this petitioner, the said determination being as follows:

"STATE OF NEW YORK:

COMPTROLLER'S OFFICE,
ALBANY, Sept. 13, 1901.

In the Matter of the Application of NEW YORK CENTRAL & H. R. R. R. COMPANY for a Revision and Resettlement of Taxes Assessed Against it under the Provisions of Chap. 908, Laws of N. Y. 1896, and the Several Acts Amendatory Thereof.

An application having been made by the above-named New York Central & Hudson River R. R. Company for a revision and
14 resettlement of the taxes assessed and determined against it by the comptroller of the State of New York for the one year ending Oct. 31, 1900, and the said comptroller having heard proofs offered on behalf of the said New York Central & Hudson River R. R. Company in support of said application, and after due consideration thereof, the comptroller does determine that the assessment heretofore made against the said New York Central & Hudson River R. R. Co., does not include taxes which could not have been lawfully demanded, and therefore declines to make any revision or readjustment of the same.

THEO. P. GILMAN,
Deputy Comptroller."

That the said petitioner then insisted, and ever since has insisted and now insists, that the said tax of $159,000, upon the said $106,000,000 of such capital stock, was erroneously and unlawfully assessed or imposed, and payment thereof could not and can not be lawfully demanded, and that the average portion of the capital stock at par of such corporation, this petitioner, throughout the said year, which bore the same relation to the entire capital stock at par as the amount of capital employed within this State bore to the entire capital of the corporation, was $66,094,657.53; and that upon said sum only could such taxes be levied or imposed at the rate of one and one-half mills; and that the total tax which could be lawfully assessed or imposed on this petitioner under section 182 of the tax law for said year ending October 31, 1900, was $99,141.99, and that the said account should be re-settled by striking therefrom or by crediting to the account of said petitioner the sum of $59,858.01.

15 VIII. That heretofore this petitioner duly deposited with the treasurer of the State of New York the full amount of the taxes, percentage, interest and other charges audited and stated in the said account, and duly filed an undertaking with the said comptroller in an amount and with sureties approved by a justice of the supreme court of the State of New York, to the effect that if the said writ is dismissed, or the said determination is confirmed, this petitioner will pay any and all charges and costs which may accrue against it in the prosecution of the writ, including costs of all appeals, a copy of such undertaking being hereto annexed, and marked "Exhibit A."

IX. That your petitioner is aggrieved by the said determination of the said comptroller. That no previous application for this writ has been made to any court or judge.

Wherefore, your petitioner, desiring to review both upon the law and the facts said determination of the said comptroller, upon such application made to him by your petitioner for a revision and resettlement of the said account as hereinabove set forth, prays that a writ of certiorari may issue out of the supreme court of the State of New York, directed to the said comptroller of the State of New York, commanding the said comptroller to certify and return at the office of the clerk of Albany county all and singular the evidence before him on such application, and all the papers and proofs upon the original statement of such account, and all the proceedings thereon and all his decisions and actions in the premises, with all the evidence, documents, reports, records and papers relating thereto in his possession or under his control, submitted to or considered by him, concerning the said account and the grounds for his refusal

16 to revise and readjust the same, to the end that his said decisions and determinations may be reviewed and the said

original and resettled account corrected and restated, and that this petitioner have such other and further relief as may be proper.

Dated New York, November 6, 1901.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
By W. H. NEWMAN, President.

IRA A. PLACE,
Attorney for Petitioner, Grand Central Station,
Borough of Manhattan, N. Y. City, N. Y.

STATE OF NEW YORK, } ss.:
County of New York, }

Edward L. Rossiter, being duly sworn, says: That he is an officer of The New York Central and Hudson River Railroad Company, the petitioner above named, to wit: the assistant treasurer thereof; that the foregoing petition is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

EDWARD L. ROSSITER.

Sworn to before me this 6th day of November, 1901.
ALBERT B. QUENEER,
Notary Public, No. 4, N. Y. County.

17 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of the New York Central and Hudson River Railroad Company
against
ERASTUS C. KNIGHT, as Comptroller of the State of New York.

Whereas, the above named, The New York Central and Hudson River Railroad Company, heretofore applied to the comptroller of the State of New York to revise and readjust the account heretofore audited and stated by the said comptroller, imposing an annual tax upon the said The New York Central and Hudson River Railroad Company, for the year ending October 31st, 1900, under section 182 of the tax law, and to have the said account restated by striking therefrom, or by crediting to the account of the said railroad company, the sum of sixty thousand five hundred and twenty-one and 46/100 ($60,521.46) dollars, and the said comptroller having thereafter, a hearing having been made upon the said application, made his determination, declining to make any revision or readjustment of the said account, and

Whereas, the said The New York Central and Hudson River Railroad Company is dissatisfied and aggrieved by the said determination and intends to review the same by writ of certiorari,
18 and desires to file an undertaking with the said comptroller, as required by section 197 of the tax law.

Now, therefore, the National Surety Company, a corporation duly authorized by the laws of the State of New York to execute surety bonds, having an office and principal place of business at No. 346 Broadway, borough of Manhattan, city of New York, New York, does hereby undertake that if the said writ of certiorari, which may be granted upon the application of the said The New York Central and Hudson River Railroad Company, to review the said determination, be dismissed, or the determination of the comptroller be confirmed, the said The New York Central and Hudson River Railroad Company will pay all costs and charges which may accrue against it in the prosecution of the said writ, including the cost of all appeals, not exceeding the sum of five hundred ($500) dollars.

Dated, New York, October 26th, 1901.

NATIONAL SURETY COMPANY,
By ROBERT M. NUGENT,
Res. Vice-President.

Attest:
[L. S.] RICHARD J. MORIARTY,
Res. Ass't Secretary.

19 STATE OF NEW YORK, } ss.:
County of New York, }

On this 26th day of October, 1901, before me personally appeared Robert M. Nugent, res. vice-president of the National Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the county of New York; that he is the res. vice-president of the National Surety Company, the corporation described in and which executed the within instrument; that he knows the corporate seal of said company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the board of directors of said company, and that he signed said instrument as res. vice-president of said company by like authority; and that the liabilities of said company do not exceed its assets, as ascertained in the manner provided in section 3, chapter 720 of New York Session Laws of 1893. And the said Robert M. Nugent further said that he is acquainted with Richard J. Moriarty, and knows him to be the res. ass't secretary of said company; that the signature of Richard J. Moriarty, subscribed to the said instrument is in the genuine handwriting of the said Richard J. Moriarty, and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said Robert M. Nugent, res. vice-president.

E. A. VIBBARD,
[L. S.] Commissioner of Deeds, New York City.

20 Copy of By-Law.

Be it remembered, that at a regular meeting of the board of directors of the National Surety Company, duly called and held on the 6th day of February, 1900, a quorum being present, the following by-law was adopted:

"Article XIII. SEC. 1. *Signatures Required.*—All bonds, recogni- "zances, contracts of indemnity and other writings obligatory in the "nature thereof, shall be signed by the president, the vice-president, "the second vice-president, a resident vice-president, or an attorney "in fact, and, except when signed by an attorney in fact, shall have "the seal of the company affixed thereto, duly attested by the secre- "tary, an assistant secretary or a resident assistant secretary. The "vice-president, second vice-president and resident vice-presidents "shall each have authority to sign such instruments whether the "president be absent or incapacitated or not; and the assistant sec- "retaries and resident assistant secretaries shall each have authority "to seal and attest such instruments, whether the secretary be absent "or incapacitated or not. All such instruments executed as herein "provided shall be as binding upon the company as if the same were "signed by the president, duly sealed and attested by the secretary."

STATE OF NEW YORK, County of New York, } *ss.:*

I, Richard J. Moriarty, res. ass't secretary of the National Surety Company, have compared the foregoing copy of by-law with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original by-law.

Given under my hand and seal of the company, in the city of New York, county of New York, this 26th day of October, 1901.

[L. S.] RICHARD J. MORIARTY,
Res. Ass't Secretary.

21 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of The New York Central and Hudson River Railroad Company, Relator,

against

ERASTUS C. KNIGHT, as Comptroller of the State of New York, Defendant.

The comptroller of the State of New York hereby makes return to the writ of certiorari issued herein November 16th, 1901, as follows:

First. He admits the allegations contained in paragraphs I., II., III., V., VI. and VIII. of the petition herein.

Second. He also admits that on or about the 30th day of January, 1901, the relator applied for a revision and readjustment of the account stated against it by said comptroller, and that such application was granted and a hearing thereon had on or about July 15th, 1901.

He also admits that thereafter the comptroller made his decision as stated in paragraph VII. of the petition herein.

22 Third. Making further return to said writ, the comptroller does not admit any of the allegations of the petition herein, except those herein expressly admitted or shown by this return.

Fourth. He further returns that said account and determination are in all things legally and properly stated and made, and that the relator is not aggrieved thereby.

Fifth. Annexed hereto and made a part hereof are the papers and proceedings before the comptroller in stating such account and making such determination, other than those set out in the petition herein as follows:

Exhibit "A." Application for revision and readjustment.

Exhibit "B." Proceedings and minutes on application for revision and readjustment.

In witness whereof, I have hereunto set my hand and seal this 19th day of February, 1902.

[L. S.] NATHAN L. MILLER,
Comptroller.

23 EXHIBIT "A."

In the Matter of the Application of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY for a Revision and Readjustment of the Account Heretofore Audited and Stated by the Comptroller of the State of New York for Taxes under Section 182 of the Tax Law.

To the Honorable Erastus C. Knight, comptroller of the State of New York:

The application of the New York Central and Hudson River Railroad Company respectfully shows:

1. That it is a railroad corporation duly organized and existing under the laws of the State of New York, engaged in operating certain railroads owned or leased in the State of New York and certain railroads leased in other States, and that a part of its capital is, and during the year ending October 31st, 1900, was, employed within this State and that a part of such capital is not, and was not in or during said year employed in the State of New York.

2. That on or before the 15th day of November, in the year
24 1900, it duly made a written report to the comptroller of the State of New York as required by subdivision 1 of section 189

of the tax law; such report being in a form prescribed by the said comptroller of the State of New York; and that such report showed the condition of the said company at the close of its business on October 31st, preceding, and that in said report was stated the amount of its authorized capital stock, the amount of stock, paid in, the date and rate per centum of each dividend declared by it in each quarter of the year ending on the said October 31, 1900; that such dividends amounted to less than six per centum on the par value of the capital stock of the said company; the entire amount of the capital of the said corporation and the capital employed by it in this State during such year.

3. That said report showed that from and after November 1st, 1899, to and until March 31, 1900, the amount of the authorized capital stock of this company was $100,000,000, all of which was paid in and issued; and that from and after April 1st, 1900, to and until October 31st, 1900, the amount of the authorized capital stock of this company was $115,000,000, all of which was paid in and issued; and that during the same year -ing October 31st, 1900, the entire capital of this company was $338,897,656.69; and that the amount of such capital employed within this State during the said year ending October 31st, 1900, was $204,587,574.76; and that the balance of such capital, $134,310,081.93, was employed outside of the State of New York during the said year ending October 31st, 1900; and that the portion of the capital stock of the said company which bore the same relation to the entire capital stock of the said company as the amount of capital employed within this State bore to the entire capital of the said company was, from and after November 1st, 1899, to and until March 31st, 1900, $60,370,000, and from and after April 1st, 1900, to and until October 31st, 1900, $69,425,500.

4. That subsequent to the said 15th day of November, 1900, the said comptroller audited and stated the account for taxes to be paid and sent notice thereof to the said company.

5. That the said account so audited and stated imposed a tax of $159,000, purporting to be a tax of one and one-half mills upon $106,000,000.

6. That the said $106,000,000, the portion of the capital stock at par of the said company upon which said tax was based or imposed as aforesaid, was greater than the portion of such capital stock at par as the capital employed within this State bears to the entire capital of the corporation by $45,630,000 of such capital stock at par during the first five months of the said year, and by $36,574,500 during the last seven months of said year, or an average of $40,347,625 for the said year ending October 31st, 1900; and that the said tax so imposed upon said $40,347,625, amounts to the sum of $60,521.44; that the said company has insisted, and now insists, that the said tax of $60,521.44 upon the said sum of $40,347,625 was erroneously and unlawfully assessed and imposed, and payment thereof could

not and cannot be lawfully demanded, and that said tax is wholly without warrant or authority of either law or fact.

Wherefore, the said company makes this application and prays that the said account so audited and stated be revised and readjusted, and that the said account be resettled by striking therefrom or by crediting to the amount of the said company the said sum of
26 $60,521.44; and that the said company have such other and further relief as may be proper.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
By G. S. PRINCE, Treasurer.

IRA A. PLACE,
Attorney for the Applicant, Grand Central Station,
Borough of Manhattan, N. Y. City, N. Y.

STATE OF NEW YORK,
County of New York, } ss:

George S. Prince, being duly sworn, says: that he is an officer of The New York Central and Hudson River Railroad Company, the applicant above named, to wit: the treasurer thereof; that the foregoing application is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to — true.

G. S. PRINCE.

Subscribed and sworn to before me this 30th day of January, 1901.

JOHN A. MATTISON,
Notary Public, N. Y. County, N. Y.

27 EXHIBIT "B."

STATE OF NEW YORK:

Comptroller's Office.

In the Matter of the Application of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY for a Revision and Readjustment of the Account Heretofore Audited and Stated by the Comptroller of the State of New York for Taxes under Section One Hundred and Eighty-two of the Tax Law for the Year Ending October Thirty-first, Nineteen Hundred.

Rehearing held at the office of the State comptroller, July 15th, 1901, before Willis E. Merriman, second deputy comptroller.

Appearances.

Frederick H. Meeder appeared for the company.
Thomas Emery, as counsel.

Mr. MEEDER, being duly sworn, testified as follows:

By Mr. EMERY:

Q. State your name, Mr. Meeder?
A. Frederick H. Meeder.
Q. Where do you reside?
A. South Orange, New Jersey.

28 Q. Are you in the employ of the New York Central and Hudson River Railroad Company?
A. Yes, sir.
Q. In what department and in what capacity?
A. Comptroller's office and in capacity of general bookkeeper.
Q. Does that office have charge of the books and accounts such as enter into the making up of return of capital employed?
A. Yes, sir.
Q. Did you make up or assist in making up of the company's report to the State comptroller of its capital employed for the year ending October thirty-first, nineteen hundred?
A. Yes, sir.
Q. Have you recently had occasion to go over those figures again?
A. Yes, sir.
Q. With reference to attending here and testifying?
A. Yes, sir.

Mr. EMERY: I offer in evidence recapitulation, distribution of assets, October 31, 1900.
Same received and marked Ex. A for identification.

Q. Examine the paper marked Exhibit A for identification, the heading of which is "Recapitulation, distribution of assets October 31, 1900," and say whether that is the statement that you made up as the result of the figuring last mentioned?

A. Yes, sir, it is.

Q. And what have you to say as to the correctness of these figures, as you have them upon this statement?

A. I believe those to be correct.

Q. The first figures in the column headed "Outside New York State," to wit, $15,230,186.06, state, if you please, what that item is made up of?

A. That is made up of an item of $772,178.81, representing proportion of the total valuation of passenger cars which is employed outside of the State, this proportion being based upon a per-
29 centage furnished by the car accountant; in other words, upon a wheelage basis; also an item of $14,458,007.25, representing a valuation of freight cars employed outside of the State, a proportion of the total being based upon a percentage furnished by the car accountant in a similar manner to that for passenger cars.

Q. Directing your attention to the second item in the same column, namely, $117,401,219.01, state, if you please, the items going to make up that amount?

A. That consists of stocks of other companies in which the capital of the New York Central and Hudson River is employed outside of New York State as follows——

Mr. MERRILL: I am going to object to that answer, simply as to the form in which he has answered it, that is all; he states a conclusion there, that is, there isn't capital; I haven't any objection to his stating facts, but I do object to his stating conclusion; that is, if he wants to say that so much money of New York Central and Hudson River Railroad Company, or anything of that kind, is there, I have no objection, but when he states conclusion as to what constitutes capital, we will have to have him qualify himself on that if he is going to do it.

By Mr. EMERY: At any rate, when the entire statement is before you, it will show for itself what it is, anyhow.

Mr. MERRILL: I would rather have him state it some other way—it is a conclusion on his part.

Mr. EMERY: Well, I should feel obliged to offer it in that form.

Mr. MERRILL: He can state what the facts are, Mr. Emery.

30 Mr. EMERY: That is what I suppose he is to proceed to do.

Mr. MERRILL: I will let him proceed and you can qualify him if you do it in that way.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of the New York Central and Hudson River Railroad Company
against
ERASTUS C. KNIGHT, as Comptroller of the State of New York.

Order for Issuance of Writ of Certiorari.

On reading and filing the petition verified and dated the sixth day of November, 1901, of the New York Central and Hudson River Railroad Company, and upon the undertaking heretofore filed by the said railroad company, pursuant to section 197 of the tax law, and upon the notice of this application duly served on the comptroller of the State of New York, and after hearing Harris & Rudd, Esqrs., of counsel for the petitioner, and Robert E. Steele, Esq., deputy attorney-general for the State comptroller, and on motion of Ira A. Place, Esq., attorney for the petitioner, it is

5 Ordered, that a writ of certiorari do issue from and out of this court pursuant to the prayer of the petitioner, directed to Erastus C. Knight, as comptroller of the State of New York, to review the decision and determination of the said comptroller mentioned and described in the petition, and the question involving the merits therein mentioned, both upon the law and the facts, which writ shall be returnable within twenty days after service thereof upon the said comptroller, at the office of the clerk of Albany county.

Enter.

D. CADY HERRICK, Justice.

6 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of the New York Central and Hudson River Railroad Company
against
ERASTUS C. KNIGHT, as Comptroller of the State of New York.

Writ of Certiorari.

Whereas, we have been informed by the verified petition of the New York Central and Hudson River Railroad Company, dated and verified the sixth day of November, 1901, that certain proceedings have been had before the comptroller of the State of New York in a certain matter entitled "In the matter of the application of the New York Central and Hudson River Railroad Company for a revision and readjustment of the account heretofore audited and stated by the comptroller of the State of New York for taxes under section 182 of the tax law, for the year ending October 31st, 1900," upon the application of the said railroad company to revise

and readjust an account theretofore audited and stated by the said comptroller of the State of New York for taxes to be paid by the said The New York Central and Hudson River Railroad Company under section 182 of the tax law, the petition upon which the said
7 application was made being verified January 30, 1901, and a hearing upon such application having been had on the 15th day of July, 1901, and the said comptroller having thereafter made his determination and sent written notice of his determination upon such application to the applicant, the pet[illegible] herein, denying the application and declining to make any revision or readjustment of the said account, and the said The New York Central and Hudson River Railroad Company having now made application to this court for a writ of certiorari to review the said decision and determination of the said comptroller;

And we being willing for certain purposes to be certified of such proceedings, if any such were had, do hereby command and strictly enjoin Erastus C. Knight, as comptroller of the State of New York, that he certify and return all and singular the evidence before him on such application, and all the papers and proofs upon the original statement of such account and all proceedings thereon, and all his decisions and actions in the premises, with all the evidence, documents, reports, records and papers relating thereto in his possession, or under his control, submitted to or considered by him, concerning the said account and the grounds of his refusal to revise and readjust the same, as prayed for in the petition, within twenty days after the service upon him of this writ, at the office of the clerk of Albany county, under his proper hand, pursuant to the provisions of the tax law and the provisions of title II., of chapter 16 of the Code of Civil Procedure, so that our supreme court may further cause to be done thereon what of right and according to law ought to be done, and let the defendant have then and there this writ.

Witness the Hon. D. Cady Herrick, justice of our honorable
8 court, at the court house in the city of Albany, N. Y., this 16th day November, 1901.

[SEAL.] P. E. McCABE, Clerk.

IRA A. PLACE,
Attorney for the Relator, Grand Central Station,
Borough of Manhattan, N. Y. city, N. Y.

The above writ is hereby allowed this 16th day of November, 1901.

D. CADY HERRICK,
Justice Supreme Court.

that a separate company in which the New York Central and Hudson River Railroad Company is a stockholder?

A. The New York Central and Hudson River Railroad Company operates the D. A. V. & P. R. R. Company under the terms of a lease, and at the same time is also a stockholder in that company.

Q. Now, does the New York Central and Hudson River Railroad Company operate the Lake Shore and Michigan Southern Railroad Company?

A. No, sir.

Q. Does it operate the Michigan Central Railroad Company?

A. No, sir.

Q. Does it operate the Cleveland, Cincinnati, Chicago and St. Louis railway?

A. No, sir.

Q. Or the Lake Erie and Western railroad?

A. No, sir.

Q. Or the Chesapeake and Ohio railroad?

A. No, sir.

Q. Or the Pennsylvania and Western railway?

A. No, sir

Q. Does it operate the Merchants' Despatch Transportation Company?

A. No, sir.

Q. Why did you change your figures in relation to the assets within and without the State, Mr. Meeder?

34 A. Because there were certain figures in regard to which there might be some doubt, some question, and upon advice of counsel it seemed better to give the State the benefit of the doubt rather than to argue further upon them.

Q. In arriving at the value of road and equipment outside of the State of New York what road, what equipment, enters into that—all these various lines which you name, the Merchants' Despatch Transportation—a certain amount?

A. No, sir, only the equipment which is owned by the New York Central and Hudson River Railroad Company.

Q. Then that simply consists of cars?

A. Yes, sir, that is all.

Q. Now, in these stocks of other companies you have included investments in the Lake Shore and Michigan Southern, have you not?

A. Yes, sir.

Q. And the Michigan Central?

A. Yes, sir.

Q. The Merchants' Despatch Transportation Company?

A. Yes, sir.

Q. The Pennsylvania and Western railroad?

A. Yes, sir.

Q. The Pittsburgh and Eastern?

A. Yes, sir.

Q. The Cleveland, Cincinnati, Chicago and St. Louis?

A. Yes, sir.
Q. The Lake Erie and Western?
A. Yes, sir.
Q. And the Chesapeake and Ohio?
A. Yes, sir.
Q. How many of these stocks were bought since the last bond issue of the New York Central and Hudson River Railroad Company?

Objected to by Mr. Emery.
Objection overruled.

A. Well, Mr. Merrill, perhaps I had better answer that question in this way: We have been issuing bonds continually for the last two or three years in connection with refunding, and the only other bonds which I can recollect having been issued have been for construction purposes.

35 Q. Mr. Meeder, what is your recollection with relation to the purchase of stocks of the Lake Shore and Michigan Southern railroad and the Michigan Central railroad, were those stocks purchased by bonds issued?

Objected to by Mr. Emery.
Objection overruled.

A. The Lake Shore and Michigan Southern and Michigan Central?
Q. Yes?
A. Yes, sir, they were.
Q. With what funds—that is, funds from what source was the stock of the Chesapeake and Ohio Railroad Company purchased?

Objected to by Mr. Emery. Objection overruled.

A. That was purchased from—purchased with cash belonging to the company.
Q. Where did the cash come from?

Objected to by Mr. Emery. Objection overruled.

Q. In other words, was it moneys received from bond issues or was it moneys the result of the operation of the railroad business of the New York Central and Hudson River Railroad Company, or was it moneys received from the sale of the stock of the New York Central and Hudson River Railroad Company?

Objected to by Mr. Emery. Objection overruled.

A. To the best of my recollection, it was from—this stock was purchased from moneys received from none of the above sources.
Q. From what source was it received?

Objected to by Mr. Emery. Objection overruled.

A. To the best of my recollection, the money for the purchase of

the Chesapeake and Ohio Railway stock was obtained by means of a cash loan.

36 Q. What security did you give for that, Mr. Meeder?

A. I am unable to say.

Q. The books of the company wouldn't show?

A. No, sir.

Mr. MERRILL: The comptroller will ask you to find out what security was given for this loan.

Q. Now for what was, or with what was, the stock of the Lake Erie and Western Railroad Company purchased?

Objected to by Mr. Emery. Objection overruled.

A. To the best of my recollection, the money was obtained by the same means as for the purchase of the Chesapeake and Ohio Railroad stock.

Mr. MERRILL: Will you please furnish the comptroller with some information that has been asked in regard to funds with which Chesapeake and Ohio Railway stock was made?

Q. Is this also true of the stock of the Cleveland, Cincinnati, Chicago and St. Louis railroad?

Objected to by Mr. Emery. Objection overruled.

A. Yes, sir.

Mr. MERRILL: The comptroller would also like the information in regard to that.

Q. Now, what about Pennsylvania and Western Railroad Company—was that stock purchased in same way?

Objected to by Mr. Emery. Objection overruled.

A. No, sir; that was purchased from the current funds of the company.

Q. During the year ending October 31st, 1900, what stocks of foreign corporations were deposited as collateral security in the State of New York?

Objected to by Mr. Emery. Objection overruled.

37 A. So far as I know, the stock of the Lake Shore and Michigan Southern Railway Company and of the Michigan Central Railroad Company, as shown on the balance sheet of the New York Central and Hudson River Company on October 31st, 1900—in amount as shown on the balance sheet.

Q. Mr. Meeder, were these stocks on deposit there for collateral security during the entire year ending October 31st, 1900.

Objected to by Mr. Emery. Objection overruled.

A. I believe that the amount of Lake Shore and Michigan South-

ern Railway stock was on deposit during the entire year ending October 31st, 1900, but the amount of Michigan Central stock on hand October 31st, 1899, was slightly less than the amount on hand on October 31st, 1900.

Q. Well, it was substantially the same amount during the year?

A. Yes, sir.

Q. Now, do you know whether there were any other stocks of foreign corporations placed as collateral security within the State during that year?

A. No, sir; I don't know.

Q. Could you determine?

A. I could not; no, sir.

Q. Could anybody else determine—that is, anybody connected with the company?

A. I don't know.

Q. Mr. Meeder, would the books of the New York Central and Hudson River Railroad Company show where these stocks were deposited as collateral security?

A. I believe that there are records which would show.

Q. Now, Mr. Meeder, the comptroller would like for you to furnish him with a statement of the stocks of foreign corporations deposited in the State of New York as collateral security during the year ending October 31st, 1900, such a statement being itemized showing the amount of stocks and the names of the railroad companies by which such stocks were issued.

38

By Mr. EMERY: I desire to object in this way—of course, to say that Mr. Meeder shall undertake to furnish the evidence, but we object to its being received and considered as pertinent evidence in the case.

By Mr. MERRILL: You may consider this to be a demand on the part of the comptroller.

Q. Now, Mr. Meeder, is the Merchants Despatch Transportation Company a domestic corporation?

A. I think it is.

Q. Do you know?

A. I am not positive.

Mr. MERRILL: The comptroller will put in evidence a copy of the certificate of incorporation of the Merchants' Despatch Transportation Company, showing that the same is a domestic corporation, organized under the laws of the State of New York.

Same received and marked Ex. B.

Q. Now, Mr. Meeder, the item of cash, cash assets outside of New York State amounting to $965,217.97 as stated by you, consists of what?

A. A proportionate amount of dividend on Lake Shore and Michigan Southern Railway stock, all dividend on Michigan Central Railroad stock, the Pine Creek Railway stock, a proportionate

amount of dividend on Merchants' Despatch Transportation Company's stock, a proportionate amount of dividend on D. A. V. & P. R. R. stock, all of the above being anticipated in advance of payment.

Q. What has the New York Central and Hudson River Railroad Company to show for this amount of interest due it, or of dividend due it?

39 A. Do you mean what reason have they for anticipating such dividends, and believing that they will be paid?

Q. I mean, what have they to show that they have any such assets as $965,217.97 due them as dividends upon the stock of foreign corporations or domestic corporations?

A. In the case of the Lake Shore and Michigan Southern railway that asset is based upon——

Q. I am not asking you what it is based upon, I am asking what the New York Central and Hudson River Railroad Company has to show that it has got such an asset as that?

A. The ownership of the stock itself.

Q. Is that the only thing it has?

A. And in the case——

Q. Is that the only thing it has, the ownership of the stock?

A. No, sir.

Q. What else did it have?

A. In the case of the Pine Creek railway——

Q. I mean in relation to that Lake Shore and Michigan Southern?

A. You are referring to Lake Shore and Michigan Southern alone now?

Q. I say, is it the only evidence it has?

A. I thought you were speaking of this whole group.

Q. I say, is that the only evidence the railroad company has, the ownership of assets, simply the ownership in the share stock?

A. It has, besides the stock, only the intangible asset of regularity of dividend.

Q. But these dividends have not been declared, have they?

Mr. EMERY: That is, you mean they hadn't on the thirty-first of October?

Mr. MERRILL: Yes.

A. No, sir.

By Mr. MERRILL:

Q. Then what property right had the New York Central
40 and Hudson River Railroad Company to any of these dividends—the amount of those dividends was still the property of these several corporations, was it not?

Objected to by Mr. Emery as calling for a conclusion.

Objection overruled.

Q. I am asking for fact, he can say yes or no as he chooses?
A. Its right as being the holder of nearly all the capital stock of that company.
Q. Is that your answer?
A. That is my answer.
Q. Did the New York Central and Hudson River Railroad Company, on October thirty-first, have any book account on its records in the city or State of New York showing any such balance as that to be due or amount as that to be due it from these several corporations?
A. Yes, sir, it did.
Q. Did it have any other record anywhere else than that which it carried on its books in the office in the city of New York?
A. No, sir, not that I know of.
Q. Does the New York Central keep any books anywhere else, general books?
A. No, sir.
Q. Now, Mr. Meeder, do the books of account of the New York Central and Hudson River Railroad Company show any amounts due from any of these companies in which you have ownership amounting to $171,653.20?
A. Yes, sir, in the case of the D. A. V. & P. R. R., in the item of cash, cash assets in New York State, there is included a charge against the D. A. V. & P. R. R. for net earnings from operation.
Q. Amounting to how much?
A. Amounting to about one hundred thousand dollars, I believe; but these net earnings are before the payment of first charges of any kind by the New York Central and Hudson River railroad.
Q. Mr. Meeder, if the New York Central and Hudson River
41 Railroad Company had expended upon the properties of these other companies this amount of $171,653.20 and expects no recompense from it or payment, why should the New York Central and Hudson River Railroad Company carry it as an asset when they have absolutely no title to it?
A. Because to that extent it represents an interest in the property.
Q. Has it an interest that could be removed?
A. I don't know; you mean removed by New York Central?
Q. Yes, and the records of the New York Central and Hudson River Railroad Company do not show any of these companies to be owing to the company for these moneys expended on their property?
A. No, sir, it shows them simply as an investment.
Q. Then your answer is, no?
A. Yes, that is my answer.
Q. Now, this item of fuel and supplies, what is that?
A. That represents coal and supplies in shop, storehouses and miscellaneous supplies on the lines of our road in New Jersey and Pennsylvania.
Q. What road?

A. The West Shore railroad in New Jersey, the Beach Creek railroad in Pennsylvania, the Fall Brook railroad in Pennsylvania.

Q. Now, what is your theory in determining the equipment of the New York Central located outside of the State. When you take a mileage basis, for instance, the property investment in a car leaving the New York Central depot and running to San Francisco would be no more than it would if it simply ran to Buffalo, would it?

A. Well, the actual amount of ownership by the New York Central in that car would be unchanged.

Q. Actual amount of investment you mean would be unchanged?

A. In the car, yes.

42 Q. How did you determine investment upon this wheelage basis—mileage basis?

A. The car accountant has records showing the equipment of the New York Central and Hudson River Railroad Company in use on its own and on foreign lines, From those records, which I believe are compiled monthly, he obtains a yearly average which is furnished to the comptroller's office of the railroad and is used in connection with the report to the State.

Q. Then he simply takes such a portion of the amount invested in all the cars of the New York Central and Hudson River Railroad Company as the number of miles over which cars pass in the State of New York is to the whole number of miles over which all the cars pass, is that it?

A. No, sir, not necessarily; for instance, in the case of freight cars, there may be a great many on lines which are entirely out of New York State, and may remain on such lines for a length of time without making any mileage within the State of New York.

Q. Now, Mr. Meeder, the New York Central and Hudson River Railroad Company has the use of the cars of other railroad companies, does it not?

A. Yes, sir.

Q. And approximately, what percentage does it have of other companies' cars compared with percentage of its own cars outside of State, amount of cars outside of State?

Objected to by Mr. Emery.

Objection overruled.

A. I cannot tell.

Q. There are more New York Central cars outside of State than New York Central has of other people's cars in the State, aren't there?

A. Yes, that is true.

Q. What equipment did the New York Central Railroad

43 Company buy between April first, nineteen hundred and October thirty-first, nineteen hundred?

A. I haven't the data here that would show that.

Q. Well, what was this fifteen millions of new stock used for?

A. For the purchase of new equipment.

Q. Do you know at what average price the stock of New York

Central and Hudson River Railroad Company sold during year ending October thirty-first, nineteen hundred?

Objected to by Mr. Emery.
Objection overruled.

A. The average based upon the highest price during the year and the lowest price during the year would be one hundred and thirty.

Q. What were the total assets of the New York Central and Hudson River Railroad Company during the year ending October thirty-first, nineteen hundred?

A. $338,897,656.69.

Q. What were the liabilities exclusive of the capital stock?

A. $210,258,536.63.

Q. In reaching that conclusion, Mr. Meeder, what amount did you take as capital stock of corporation?

A. One hundred and fifteen million dollars.

Q. In arriving at a division of the capital stock of the Lake Shore and Michigan Southern did you take the miles of road owned by the Lake Shore and Michigan Southern, or did you take the miles owned and leased by the Lake Shore and Michigan Southern?

A. Took the miles of road operated.

Q. And not the miles of lines owned; that is, you took operated lines, leased lines located without the State on same basis as though those lines had been owned by the Lake Shore and Michigan Southern, didn't you?

A. No, sir, we took the entire line operated, on the basis
44 that the entire line represented the mileage in which the capital of the Lake Shore road was employed.

Q. Well, what about the employment of the capital of the Lake Shore road—you don't mean to contend that the Lake Shore and Michigan Southern has as much capital invested in a mile of road owned by another corporation over which it operates as it has in a mile of road which it owns and over which it operates, do you?

A. No, sir, I don't mean that—the capital stock covers more than the main line of the road.

Q. Yet in a division of that you have taken into consideration all these leased lines without the State, haven't you?

A. Yes, sir.

Q. Mr. Meeder, I believe you have conceded that the stocks of the Lake Shore and Michigan Southern and Michigan Central were bought from bonds?

A. Yes, sir.

Q. Will you please tell the comptroller briefly what took place in order to make that purchase on the part of the New York Central Railroad Company?

Objected to by Mr. Emery.
Objection overruled.

Q. Did the New York Central and Hudson River Railroad Company mortgage its property located within the State?

Objected to by Mr. Emery.
Objection overruled.

A. I don't know.

Q. Why did the New York Central Railroad Company place these stocks as collateral security with trust companies in city of New York?

A. As security for issue of what are called the three and one-half per cent. collateral bonds.

Mr. MERRILL: Mr. Meeder, the comptroller would like a statement of the outstanding funded debt as of October 31st, 1900, of
45 the New York Central and Hudson River Railroad Company.
Same received and marked Ex. C.

Mr. MERRILL: Now, I want to show by the reports made by the New York Central and Hudson River Railroad Company for year ending October thirty-first, eighteen hundred and ninety seven and for year ending November first, eighteen hundred and ninety-five, that the New York Central and Hudson River Railroad Company had employed outside the State $8,807,876.00, consisting of average amount of rolling stock owned by this company and employed in running outside of State of New York, and investments of New York Central in shares of stock located and permanently engaged outside of State of New York for year ending October thirty-first, eighteen hundred and ninety seven and for year ending November first, eighteen hundred and ninety-five; that the entire capital stock of one hundred million dollars outstanding at that time was paid up and that but $6,436.714.00 of such capital stock was employed in State of New York for the year ending November first, eighteen hundred and ninety-five, as shown by the report, and for that purpose the comptroller offers in evidence the report of the New York Central and Hudson River Railroad Company for those years.

Mr. EMERY: Objected to on the ground that in so far as the assets of the company at that time would, upon the same basis as the company's present contention proceeds upon, differ from its present showing, such representation was by inadvertence and is not evidence of what the actual facts were during or at the end of the years in question.

Objection overruled. Same received and marked Exhibits D and E.

46 By Mr. EMERY:

Q. Mr. Meeder, referring to the item, Merchants' Despatch Transportation Company 89% $2,597,400.00, to wit: $2,311,686.00, as being outside of the State, state, if you please, how that 89% was arrived at and what it represents?

A. Represents the percentage of cars of the M. D. T. Company in

use outside of the State of New York, such percentage having been furnished from the office of that company.

Q. In answer to Mr. Merrill's question, you stated in substance a certain amount as being the amount of the entire capital of the New York Central and Hudson River Railroad Company for the year ending October thirty-first, nineteen hundred, state what the fact was as to whether the company's entire capital was increased by fifteen millions at the same time that its capital stock was increased that amount?

A. Yes, sir.

Mr. EMERY: Now, Mr. Merrill, I desire to offer in evidence the trust agreements the same as were put in evidence before.

Same received and marked Exhibits D and E.

Mr. MERRILL: I offer in evidence annual report to comptroller for year ending October thirty-first, nineteen hundred.

Same received and marked Ex. F.

47

EXHIBIT A.

Recapitulation.

Distribution of Assets October 31, 1900.

	In N. Y. State.	Outside N. Y. State.	Total.
Cost of road and equipment	$166,074,130.15	$15,230,186.06	$181,304,316.21
Lessor companies	6,660,290.98	.....	6,660,290.98
Stock of other companies	9,158,362.88	117,401,219.01	6,559,581.89
Bonds of other companies	4,080,411.52	.....	4,080,411.52
Cash and cash assets	7,891,812.31	965,217.97	8,857,030.28
Ownership in other lines, real estate, etc.	5,973,043.80	171,653.20	6,144,697.00
Fuel & supplies	3,992,485.63	100,000.00	4,092,485.63
Sinking fund	1,198,843.18	.....	1,198,843.18
	$205,029,380.45	$133,868,276.24	$338,897,656.69
	60.50%	39.50%	100%

EXHIBIT B.

Articles of Incorporation of Merchants Despatch Transportation Company.

This company was conceded to be a domestic company.

48 EXHIBIT C.

New York Central & Hudson River Railroad Company Funded Debt, October 31, 1900.

Bonds.	Outstanding.	Issued for.
First mortgage N. Y. C. & H. R. R. R., 7%	$18,481,000.00	Cannot tell.
" " " Sterling, 6%	5,859,467.97	"
Extended debt certificates, 4%	3,772,500.00	"
Debenture certificates, 1884, 5%	4,859,000.00	Reimbursement to treasury for surplus earnings used for construction purposes between 1871 and 1883, and also to refund certain Hudson River R. R. and N. Y. Central R. R. bonds.
Debenture certificates, 1889, 5%	659,000.00	Purchase Niagara Bridge and Canandaigua R. R.
Gold debentures, 1890, 4%	5,657,000.00	Completing, finishing or operating railroad.
Gold mortgage bonds, 3½%	37,080,397.42	General purposes of company, $3,019,900 balance for refunding of previous issues.
Gold bonds, "L. S. collateral," 3½%	90,578,400.00	To purchase capital stock L. S. & M. S. Ry. Company.
Gold bonds, "M. C. collateral," 3½%	18,900,825.00	To purchase capital stock of M. C. R. R. Company.
Total	$185,797,590.39	

49 EXHIBIT D.

Report of the New York Central and Hudson River Railroad Company for the year ending the first day of November, A. D. 1895, made pursuant to provisions of chap. 542, Laws of 1880, and the subsequent acts amendatory thereof.

GRAND CENTRAL STATION,
NEW YORK, November 13th, 1895.

To the comptroller of the State of New York:

Agreeable to law, as treasurer of the above company, I make the following report viz.:

1. This company began business in the State of New York in the month of November, 1869.

2. The last report made by this company to the comptroller of the State of New York under the provisions of the above act, was made for the year ending November 1st, 1894.

3. Value of real estate and of interest or interests in real property in New York State, and where situated ..... Cannot give.

4. Organized under the laws of the State of New York.

5. Date of organization of the company, November, 1869.
6. Total authorized capital of company, $100,000,000.
7. Whole number of shares of stock authorized, 1,000,000.
8. Number of shares of stock issued to June 30, 1895, 954,283; from June 30, '95, 1,000,000.
9. Par value of each share, $100.00.
10. Amount paid into the treasury of the company on each share (see answers to Nos. 8 and 9).
11. Amount of capital paid in (see answers to Nos. 8 and 9).
12. Amount of capital upon which dividends were declared (do.).
13. Date of each dividend payable January 15, April 15, July 15, October 15.
14. Amount of each dividend payable, $1,192,853.74, $954,283.00, $1,000,000.00, $1,000,000.00.
15. Rate per cent. per annum of dividends, four and one-quarter per cent.
16. The business transacted by this company in the State of New York for the year ending November 1st, 1895, was as follows: Railroad.
17. And such business was carried on at the following named place or places ..... Very numerous places.
18. Capital stock employed in New York State ..... All but $6,436,714.00.
19. If not in New York State, where and how employed ..... Property permanently invested and employed outside of New York State.
20. Highest price of sales of stock during the year aforesaid, 104⅜.
21. Lowest price of sales of stock during the year aforesaid, 92⅜.

E. V. W. ROSSITER, Treasurer.

STATE OF NEW YORK, }
County of New York, } ss.:

On this thirteenth day of November, A. D. 1895, personally appeared before me, a notary public in and for the county of New York, Edward V. W. Rossiter, treasurer of the above-named company, who being duly sworn according to law, did depose and say, that the foregoing report is just, true and correct according as the accounts stand in the books of the company, and that it includes all dividends, whether cash, stock, scrip, or of any character or description, declared by said company during the year ending on the first day of November, A. D. 1895.

E. V. W. ROSSITER, Treasurer.

Sworn and subscribed before me the day and year aforesaid.

J. P. McMAHON,
Notary Public, New York County.

A. D. A. V. & P. R. R. 48 3/14/90 6/10 of $156,912.38 equals	$83,651.96
Merchants' Despatch Transportation Company 89 per cent. of $2,597,400.00 equals	2,311,686.00
Morris Run Coal Mining Company	900,000.00
New Jersey Junction Railroad Company	100,000.00
Pine Creek Railway Company	100.00
West Shore and Ontario Terminal Railway Company	2,900.00
Jersey City and Bayonne Railroad Company	13,500.00
New Jersey Shore Line Railroad Company	31,000.00
Beech Creek Railroad Company	1,125.00
Lake Shore and Michigan Southern Railway Company 1342.32/1413.44 of $90,578,400.00 equals	86,020,770.53
Michigan Central Railroad Company	18,900,825.00
Clearfield Bituminous Coal Corporation	200.00
Pennsylvania and Western Railroad Company	10,983.61
Chest Creek Railroad Company	6,000.00
West Branch Valley Coal Company	25,000.00
Pittsburgh and Eastern Railroad Company	150,000.00
Cleveland, Cincinnati, Chicago and St. Louis Railway Company	4,307,379.52
Lake Erie and Western Railroad Company	2,897,642.60
Chesapeake & Ohio Railway Company	1,638,454.79

31 By Mr. EMERY:

Q. That makes total of?

A. $117,401,219.01.

Q. The third item in the column headed "Outside New York State," being $965,217.97, please state what enters into that item?

A. That consists of anticipated dividends on securities owned as follows:

Lake Shore and Michigan Southern Railway Company, 1342.32/1413.44 of $792,561, being three months' proportion of dividend of 7 per cent. per annum on 452,892 shares of stock, equals	$752,681.74
Michigan Central railroad, 3 months' proportion at 4 per cent. per annum of dividend on 164,355 shares of stock, equals	164,355.00
Pine Creek railway, 3 months' proportion at 3½ per cent. per annum of dividend on 19,980 shares of stock, equals	8,741.29
Merchants' Despatch Transportation Company, 89 per cent. of $38,961, being proportion of dividend of 1½ per cent. on $25,974 shares of stock, equals	34,675.20
D. A. V. & P. R. R., 48.3/90.6 of $8,937.50, being eleven months' proportion of dividend of one-half of 1½ per cent. per annum on 13,000 shares of stock, equals	4,764.69
A total of	$965,217.97

Q. Now state, if you please, what the next item is made up of, to wit, the item of $171,653.20?

A. That consists of $92,481.50, representing proportion on a
32 mileage basis of money paid on behalf of the D. A. V. & P. R. R. Company for improvements, and so forth, for which this company expects no return.

Q. By that you mean that it holds no obligation against the D. A. V. & P. R. R. Company for its refund?

A. Yes, sir, that is my meaning. $1,490.54, representing a membership in the Chicago board of trade; $65, representing a membership in the Montreal board of trade; $10, representing a membership in the Montreal corn exchange; $52,991.47, representing amount expended for drainage of land on Palisade ridge in the State of New Jersey; $24,184.23, representing amount expended for improvement of highway from Weehawken, New Jersey, to top of Palisades; $408.54, representing payments on behalf of the Pennsylvania and Western railroad, a corporation of the State of Pennsylvania, and $21.92, representing expenditures on behalf of the Chest Creek railroad, also a corporation in the State of Pennsylvania—a total of $171,653.20.

Q. And the item of $100,000, what does that consist of?

A. That represents the estimated value of this company's fuel and supplies in the State of Pennsylvania.

Q. In speaking of the company having these respective amounts of capital invested in the properties you have named outside of the State, say in what sense you have thus used the word capital?

A. The term capital I have used in the sense that it is the assets of the corporation employed in conducting its business.

Q. You may state, if you please, Mr. Meeder, what was the amount of capital stock of the company for the year ending October 31, 1900?

A. The capital stock to April 1, 1900, was one hundred million dollars.

33 Q. From April 1st to the end of the year it was how much?

A. One hundred and fifteen million dollars.

Mr. EMERY: I offer in evidence recapitulation, distribution of assets, October 31, 1900.

Same received and marked "Ex. A."

By Mr. MERRILL:

Q. Mr. Meeder, you made the statement to this effect that you used the term capital to signify assets of the New York Central and Hudson River Railroad Company employed in carrying on its business?

A. Yes, sir.

Q. Does the New York Central and Hudson River Railroad Company operate the Dunkirk, Allegheny Valley and Pittsburg, or is

10. Carthage, Watertown & Sackets Harbor R. R. Co.
11. Mohawk & Malone Railway Co.
12. Carthage & Adirondack Railway Co.
13. Gouverneur & Oswegatchie R. R. Co.
14. New York & Putnam Railroad Co.
15. Tivoli Hollow Railroad Company.
16. Beech Creek Railroad Company.
17. Dunkirk, Allegheny Valley & Pittsburg Railroad Company.

58 EXHIBIT F.

Report of the New York Central & Hudson River Railroad Company for the Year Ending the Thirty-first Day of October, A. D. 1900, Made Pursuant to Provisions of § 182, Chap. 908, Laws of 1896.

GRAND CENTRAL STATION, November 30, 1900.

To the comptroller of the State of New York:

Agreeably to law, as treasurer of the above company, I make the following report, viz:

1. This company began business in the State of New York in the month of November, 1869.

2. The last report made by this company to the comptroller of the State of New York under the provisions of the above act was made for the year ending October 31, 1899.

3. Value of real estate and of interest or interests in real property in New York State, and w-ere situated—cannot give.

4. Organized under the laws of the State of New York.

5. Date of organization of the company, November 1, 1869.

6. Total authorized capital of company.....	$115,000,000.00
7. Whole number of shares of stock authorized...	1,150,000
8. Number of shares of stock issued.....	1,150,000
9. Par value of each share.....	100.00
10. Amount paid into the treasury of the company on each share.....	See answers to Nos. 8 & 9.
11. *a.* Amount of capital paid in cash or property.....	
b. Amount of capital paid in good will.....	
c. Amount of capital paid in patents or copyrights.....	

59 12. Amount of capital upon which dividends were declared—$100,000,000.00 before April 1, 1900, $115,000,000.00 after April 1, 1900.

13. Date of each dividend payable: Jan'y 15, April 16, July 16, Oct. 16, 1900.

14. Amount of each dividend declared: $1,250,000 Jan. & April, $1,437,500 July & October.

15. Rate per cent. per annum of dividends, five per cent.

16. The business transacted by this company in the State of New York for the year ending October 31st, 1900, was as follows, viz: Transportation.

17. And such business was carried on at the following named place or places: Very numerous places.

18. Capital stock employed in New York State, $60,370,000 prior to March 31, 1900, $69,425,500, from April 1, 1900.

19. If not in New York state where and how employed.

20. Highest price of sales of stock during the year aforesaid, 139⅜.

21. Lowest price of sale of stock during the year aforesaid, 120.

G. S. PRINCE, Treasurer.

STATE OF NEW YORK, }
County of New York, } ss:

On this fifth day of December, A. D. 1900, personally appeared before me, a notary public in and for the county of New York, George S. Prince, treasurer of the above-named company, who, being duly sworn according to law, did depose and say, that the foregoing report is just, true and correct, according as the accounts stand in the books of the company, and that includes all dividends,
60 whether cash, stock, script, or of any other character or description, declared by said company during the year ending on the thirty-first day of October, A. D. 1900.

G. S. PRINCE, Treasurer.

Sworn to and subscribed before me, the day and year aforesaid.

J. P. McMAHON,
Notary Public (39), N. Y. Co.

Remarks.

The capital stock employed outside of New York State has been determined by taking such proportion thereof as the assets outside of the State bear to the total assets of the company in and out of New York State; viz: 39.63% of $100,000,000 from Nov. 1, 1899, to March 31, 1900; and 39.63% of $115,000,000 from April 1, 1900, to October 31, 1900.

Distribution of Assets, October 31st, 1900.

	In N. Y. State.	Outside N. Y. State.	Total.
Cost of road and equipment	$166,074,130.15	$15,230,186.06	$181,304,316.21
Hudson River bridges, Albany	1,905,878.36		1,905,878.36
Advances for lessor companies	5,715,997.91	944,293.07	6,660,290.98
Stock of other companies	9,055,764.16	117,503,817.73	126,559,581.89
Bonds of other companies	4,080,411.52		4,080,411.52
Cash and cash assets	8,847,030.28	10,000.00	8,857,030.28
Ownership in other lines of real-estate, etc	3,717,033.57	521,785.07	4,238,818.64
Fuel and supplies	3,992,485.63	100,000.00	4,092,485.63
Sinking fund	1,198,843.18		1,198,843.18
	$204,587,574.76 (60.37%)	$134,310,081.93 (39.63%)	$338,897,656.69 (100%)

61 Lines Leased.

Beech Creek railroad.
Carthage & Adirondack Railway Company.
Carthage, Watertown & Sackets Harbor Railroad Company.
Dunkirk, Allegheny Valley & Pittsburg Railroad Company.
Gouverneur & Oswegatchie Railroad Company.
Mohawk & Malone Railroad Company.
New Jersey Junction Railroad Company.
New York & Harlem Railroad Company.
New York & Putnam Railroad Company.
Niagara Falls Branch Railroad Company.
Oswego & Rome Railroad Company.
Pine Creek Railway Company.
Rome, Watertown & Ogdensburg Railroad Company.
Spuyten Duyvil & Port Morris Railroad Company.
Syracuse, Geneva & Corning Railway Company.
Tivoli Hollow Railroad Company.
Troy & Greenbush Railroad Association.
Utica & Black River Railroad Company.
West Shore Railroad Company.

62 STATE OF NEW YORK:

Comptroller's Office.

In the Matter of the Application of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY for a Revision and Readjustment of the Account Heretofore Audited and Stated by the Comptroller of the State of New York for Taxes under Section One Hundred and Eighty-two of the Tax Law for the Year Ending October Thirty-first, Nineteen Hundred.

Mr. Meeder, in response to the comptroller's request for information as to the security given for the loan of money wherewith this company purchased the shares of capital stock of the Chesapeake and Ohio Railway Company, the Lake Erie and Western Railroad Company, and the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, respectively, says: That the said respective stocks were pledged as collateral for the loan of money obtained to purchase them.

In response to the comptroller's request for information as to any stocks of foreign corporations, other than those of the Lake Shore and Michigan Southern Railroad Company and the Michigan Central Railroad Company, which were placed as collateral security within the State during the year, Mr. Meeder says the only
63 stocks so placed were those above named, and the amounts of each so placed were the amounts thereof owned by this com-

pany, as testified by him and shown in detail upon page 5 of the stenographer's typewritten minutes.

Petitioner also offers in evidence so much of the annual report of the Lake Shore and Michigan Southern Railroad Company for the year 1900 as shows its miles of road owned; entire length 1,093.48 miles, and length in New York State 71.12 miles, and its total miles of road owned and leased, entire length 1,412.78 miles, and length in this State 71.12 miles.

It is consented that the foregoing be considered as part of the evidence taken herein at the hearing on the 15th day of July, 1901.

64 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of the New York Central and Hudson River Railroad Company
against
ERASTUS C. KNIGHT, as Comptroller of the State of New York.
} Stipulation.

It is hereby stipulated that Relator's Exhibits D and E, being respectively agreements between relator and the Guaranty Trust Company of New York, setting forth the terms upon which loans were made to said relator of the moneys used and applied in the purchase of shares of the capital stock of the Lake Shore and Michigan Southern Railway Company, and of the Michigan Central Railroad Company, and the certificates of said shares deposited as collateral security for the payment of said loans and interest thereon; as also Relator's Exhibit F, being the report of the Lake Shore and Michigan Southern Railway Company for the year 1900, may be produced and used by either party upon any appeal herein with the same effect as if fully set forth herein, and if not so pro-
65 duced, shall be deemed sufficiently described herein.

Dated March 5th, 1902.

IRA A. PLACE,
Attorney for Relator.
JOHN C. DAVIES,
Attorney General, Attorney for Respondent.

66 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW York upon the Relation of the New York Central and Hudson River Railroad Company, Relator,
against
ERASTUS C. KNIGHT, as Comptroller of the State of New York, Respondent.

Stipulation under Sections 3301 and 1353 of the Code of Civil Procedure.

It is hereby stipulated, under section 3301 of the Code of Civil Procedure, that the foregoing are true copies of the petition for writ of certiorari, order for issuance of writ, writ, and return to writ and certification thereof, as required by section 1353 of the Code of Civil Procedure is hereby waived.

Dated New York, March 4, 1902.

IRA A. PLACE,
Attorney for Relator.
JOHN C. DAVIES,
Attorney General, Attorney for Respondent.

67 Order of Appellate Division.

At a stated term of the appellate division of the supreme court of the State of New York, held in and for the third judicial department of said State, at the court room of said court in the city of Albany, commencing on the sixth day of May, 1902.

Present: Hon. Charles E. Parker, P. J., Hon. Walter Lloyd Smith, Hon. S. Alonzo Kellogg, Hon. Emery A. Chase, Hon. Edgar L. Fursman, associate justices.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of the New York Central and Hudson River Railroad Company, Relator,
against
ERASTUS C. KNIGHT, as Comptroller of the State of New York, Respondent.

This cause coming on to be heard on the petition, order for issuance of writ of certiorari, the writ of certiorari and the return thereto, and after hearing Ira A. Place, Esq., of counsel for the relator,
68 and Henry B. Coman, Esq., of counsel for the respondent, the comptroller of the State of New York, the court doth determine as follows:

As Matters of Fact.

I. The comptroller of the State of New York fixed the amount upon which the tax against the relator should be computed, under section 182 of the tax law, for the year ending October 31, 1900, at $106,000,000, and the tax thereon at $159,000.

II. Relator's statement or report showed that its total capital on October 31st, 1900, was $338,897,656.69. This amount included an item of $965,217.97 anticipated dividends, being estimated earned and undeclared dividends on capital shares owned by relator in other corporations; also, an item of $171,653.20 carried on relator's books as bills receivable, but consisting of expenditures on leased lines for which relator holds no obligation for reimbursement.

III. Relator's statement or report also showed that of its total capital the amount of $205,029,380.45 was employed within this State, and that the balance thereof, $133,868,276.24 was employed outside of this State. The balance of relator's said total capital claimed to be employed outside of this State includes an item of $15,230,186.06, being such proportion of all of relator's rolling stock as the mileage thereof without the State bears to the entire mileage of said rolling stock; an item of $115,089,533.01, amount of capital stock owned by relator in foreign corporations; an item of $2,311,686, being that portion of the capital stock owned by relator in a domestic corporation which corresponds with the proportion of the assets of such domestic corporation used and employed without the
69 State; an item of $100,000, coal and supplies without the State; and the items of $965,217.97 and $171,653.20 above-mentioned in finding No. II hereof.

IV. The average amount of relator's capital stock at par during the year aforementioned was $108,750,000, and the average price thereof $129.8125, and the average cash value of the average amount of relator's capital stock for said year was $141,171,093.75.

As Matters of Law.

I. That, for the purpose of fixing the amount upon which the tax should be based, the said items of $965,217.97 and $171,653.20 should be excluded, leaving the amount of relator's total capital or assets $337,760,785.52; to the portion of said total capital, viz., $205,029,380.45, which relator admits was employed within this State, should be added the said item of $2,311,686, making of relator's capital and assets employed within this State a total of $207,341,066.45 and being .61386 + per cent. of the entire capital of relator.

II. The tax should be based and computed upon the average cash value or market price of .61386 + per cent. of the average amount of relator's capital stock during said year.

III. The amount upon which the tax against relator should have been and should be computed is $86,659,287.62 and the tax should have been and should be $129,988.93.

IV. The determination of the comptroller should be modified by reducing the tax to $129,988.93 and, as so modified, affirmed, with fifty dollars ($50) costs and disbursements to the relator.

70 Now, on motion of Ira A. Place, attorney for the relator, it is

Ordered that the said determination of the comptroller be, and the same is hereby, modified; and it is further

Ordered that the said account be corrected and restated, and that the said taxes be reduced by the sum of $29,011.07, with interest from the date of the deposit thereof by the relator with the State treasurer, with $50 costs and disbursements to the relator, and that the relator have judgment therefor.

[L. S.] JOSEPH H. HOLLANDS, Clerk.

71 Judgment of Appellate Division.

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of The New York Central and Hudson River Railroad Company, Relator, *against* ERASTUS C. KNIGHT, as Comptroller of the State of New York, Respondent. } Judgment, 1902.

This cause coming on to be heard on the petition, order for issuance of writ of certiorari, the writ of certiorari and return thereto, and after hearing Ira A. Place, Esq., of counsel for the relator, and Henry B. Coman, Esq., of counsel for the respondent, the comptroller of the State of New York, and the appellate division of the supreme court, in and for the third department, having made and filed its decision thereon stating the grounds whereon the court hath decided and determined that the determination of the said comptroller denying the application of relator for revision and readjustment of the taxes assessed and determined against it for the year ending October 31, 1900, under section 182 of the tax law, and for a resettlement of the account by striking therefrom or by crediting to the

72 account of the said relator in whole or in part as in and by its said application prayed for should be modified, and that the said account should be corrected and restated, and the taxes reduced by the sum of twenty-nine thousand eleven and seven-hundredths ($29,011.07) dollars, with interest thereon from the date of deposit thereof by the relator with the State treasurer, with fifty dollars ($50) costs and disbursements to the relator, and the relator's costs having been taxed at the sum of one hundred ninety-nine and twenty-five hundredths ($199.25) dollars,

Now, on motion of Ira A. Place, attorney for the relator The New York Central and Hudson River Railroad Company, it is

Ordered and decreed, that the said determination of the comptroller be, and the same is hereby, modified, and that the said account be corrected and restated, and that the said taxes be reduced by the sum of twenty-nine thousand eleven and seven-hundredths dollars ($29,011.07), with interest from the date of the deposit thereof by the relator with the State treasurer, and that the relator recover from the respondent herein the sum of one hundred ninety-nine and twenty-five hundredths dollars ($199.25) costs as taxed, and that it have execution therefor.

JOHN FRANEY, Clerk.

Sept. 20th, 1902, 10.40 a. m.

73 Opinion of Appellate Division.

Supreme Court, Appellate Division, Third Department.

Argued May Term, 1902; Decided Adjourned Term, July, 1902.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of The New York Central and Hudson River Railroad Company

against

ERASTUS C. KNIGHT, as Comptroller of the State of New York.

Before Parker, P. J., Smith, Kellogg, Chase, and Fursman, Associate Justices.

Certiorari issued out of the supreme court and attested on the 16th day of November, 1901, directed to Erastus C. Knight, comptroller of the State of New York, commanding him to certify and return to the office of the clerk of the county of Albany, all and singular the account, proceedings and evidence had before him on the application of the relator for the revision and readjustment of the corporation franchise tax imposed upon it for the year ending October 31st, 1900.

Ira A. Place, for relator;

John C. Davies, attorney general, and Henry B. Coman, deputy attorney general, for respondent.

74 CHASE, J.:

The principal contention of the relator is that under section 182 of the tax law in cases where dividends amounting to less than six per centum have been declared upon the capital stock of the corporation, and the cash value of the capital stock exceeds its par value, the tax should be at the rate of one and one half mills upon the *par value* of that portion of the capital stock employed within

this State and not upon its *cash value*. We understand that the court of appeals in People *ex rel.* N. Y. & E. R. F. Co. *vs.* Roberts, 168 N. Y., 14, has held against the relator's contention. The court in that case say: "The direction that the tax shall be 'upon such portion of the capital stock at par, as the amount of capital employed within this State bears to the entire capital of the corporation' was not intended to establish or fix the rate at which such capital stock was to be assessed, but a rule for the computation of the amount of capital stock on which assessment was to be made" (see People *ex rel.* Union Ferry Company *vs.* Roberts, 68 A. D., 157). The question raised by the relator is not now an open one for discussion in this court.

The comptroller fixed the amount upon which the tax should be computed against the relator under section 182 of the tax law at $106,000,000 and the tax thereon at $159,000. The relator contends that even if the amount upon which the tax should be computed is based upon the cash value of its capital stock and not its par value, the amount as fixed by the comptroller is excessive. We are unable to ascertain just how the amount was determined by the comptroller. The relator claims that its entire capital on the 31st day of October, 1900, was $338,897,656.69 and included in this amount is an item of $965,217.97 for anticipated dividends on stock of other
75 corporations owned by the relator and an item of $171,653.20 carried on the books of the relator as bills receivable. The item for anticipated dividends was made up by taking the portion of the year since dividends were last declared on the stock so owned by the relator and computing dividends for such time upon the assumption that further dividends would thereafter be declared at the same rate per annum. Possible or probable dividends, until declared, are a mere incident to the stock included in its market value. The item called bills receivable consists of expenditures for lessee and other corporations and special expenditures for the common good of the several corporations. This item is not an obligation against any corporation or corporations and the relator expects no direct return for it. It does not exist as an asset apart from the property of the corporations or the stock therein. For the purpose of fixing the amount upon which this tax should be computed these items should be deducted from the capital of the relator as above stated, leaving the amount $337,760,785.52. Of this amount the relator admits that $205,029,380.45 was employed within this State. The balance of the assets consists of $15,230,186.06 for rolling stock, being such proportion of all relator's rolling stock as the mileage thereof without the State bears to the entire mileage of all such rolling stock; $100,000 for coal and supplies without the State; $115,089,533.01 for stock owned by the relator in foreign corporations, and $2,311,686 for that portion of the capital stock owned by the relator in a domestic corporation, which corresponds with the proportion of the assets of such domestic corporation used without the State.

Under the decision in People *ex rel.* The Lackawanna Transportation Company *vs.* Knight —— A. D. — the rolling stock
76 without the State and the said coal and supplies are not capital employed within this State. The court of appeals in People *ex rel.* E. E. L. Co. *vs.* Campbell, 138 N. Y., 543, referring to stocks owned by the relator in that case, say: "As to so much of such stocks as was in corporations organized and existing in this State, it cannot be doubted that its capital was employed within this State. So much of its capital, to wit, its patents, as was used to purchase such stocks was employed for that purpose, and was thus used for the business of the relator. The stocks existed within this State and were kept and held to produce revenue here, and hence in every sense were employed within this State. They took the place as a portion of the relator's capital of the patent rights transferred in payment for them.

The stocks which the relator took in companies organized outside of this State stood for so much of the relator's capital invested outside of the State. It took a portion of its capital, to wit, a portion of its patent rights, and employed it outside of the State to purchase those stocks. Its property in those corporations, represented by its shares of stock, was outside of this State, and was in no sense employed here. Those stocks had no *situs* here and were not taxable here under any system of taxation which has ever existed in this State." (See People *ex rel.* E. E. L. Co. *vs.* Wemple, 148 N. Y., 690.) The fact that the principal part of the stock owned by the relator in foreign corporations has been pledged as collateral security for bonded indebtedness of the relator does not require that the stock so pledged, but still retained for all practical purposes, shall be omitted from the statement of relator's capital. The capital employed within this State, therefore, is said $205,029,380.45,
77 to which should be added $2,311,686, making a total of $207,341,066.45 and .61386 + per cent. of the entire capital of the relator. The average amount of the relator's capital stock at par during the year was $108,750,000, and the average price 129.8125. The average cash value of the average amount of relator's capital stock was $141,171,039.75. The amount upon which the tax should be computed against the relator, therefore, is $90,151,825.98, and the tax should have been $136,227.73.

The determination of the comptroller should be modified by reducing the tax to $136,227.73, and as so modified affirmed, with fifty dollars costs and disbursements to the relator.

51 Remarks.

Of the total capital stock of this company the sum of $6,436,714.00 employed outside of the State as follows:

1. The average amount of rolling stock owned by this company and employed in running outside of the State is.....	$5,435,240.00
(This amount is determined by taking such proportion of the value of the rolling stock as equals the wheelage outside of the State compared with the entire wheelage in and out of the State.)	
2. The investments of this company in shares of stock of railroad and coal companies situated entirely outside of this State; par value $1,169,500.00; actual value.....	1,001,474.00
Total capital employed outside of the State....	6,436,714.00

22. Names and addresses of other companies whose property is leased by company making report:

New York and Harlem Railroad Co.
Troy and Greenbush Railroad Association.
Spuyten Duyvil & Port Morris Railroad Co.
West Shore Railroad Company.
New Jersey Junction Railroad Co.
Rome, Watertown, & Ogdensburg R. R. Co.
Oswego and Rome Railroad Co.
Niagara Falls Branch Railroad Co.
Tivoli Hollow Railroad Company.
Beech Creek Railroad Company.
Dunkirk, Allegheny Valley & Pittsburg Railroad Co.
52 Utica and Black River R. R. Co.
Carthage, Watertown and Sacket Harbor Railroad Co.
Mohawk and Malone Railway Co.
Carthage & Adirondack Railway Co.
Gouverneur and Oswegatchie Railroad Company.
New York and Putnam R. R. Co.

Report of Appraisement of the New York Central and Hudson River Railroad.

STATE OF NEW YORK, County of New York, } ss:

On this thirteenth day of November, A. D. 1895, before me, the subscriber, a notary public in and for the county of New York, personally appeared Edward V. W. Rossiter, treasurer, and John

Carstensen, comptroller of the above-named company, who being by me severally duly sworn, did say that the amount of capital paid in of said company is $100,000,000.00 (after June 30, 1895), and that said company declared no dividend in cash, stock, scrip or of any other character or description during the year ending the first day of November, 1895, save the dividends herein reported, and that they will with fidelity, according to the best of their knowledge and belief, estimate and appraise the capital stock of said company at its actual value in cash, not less, however, than the average price which said stock sold for during said year.

E. V. W. ROSSITER, Treasurer.
J. CARSTENSEN, Comptroller.

Sworn to and subscribed before me the day and year aforesaid.

J. B. McMAHON,
Notary Public, New York County.

53 Office of the New York Central and Hudson River Railroad Company, Grand Central Station, New York, November 13th, 1895.

We, the undersigned, being the treasurer and comptroller of the above-named company, do certify that, in pursuance of our aforesaid oaths, we have estimated and appraised the capital stock of said company at its actual value in cash, as follows viz.: from 954,283 to 1,000,000 shares at ninety-eight dollars and sixty-two and one-half cents per share, amounting in the whole to eighty-nine million, two hundred and seventy thousand nine hundred dollars 00/100, per slip attached.

In witness whereof we have hereunto set our hands the day and year aforesaid.

E. V. W. ROSSITER, Treasurer.
J. CARSTENSEN, Comptroller.

Shares outst'g.	(Slip) period.	P'p'n of tax yr.	Average rate of sales per share.	
954,283	Nov. 1/94 to June 30/95	8/12s	98⅝	
	Appraised val'n			62,744,109.00
1,000,000	June 30/95 to Oct. 31/95	4/12s	98⅝	
	Appraised val'n			32,875,000.00
	Total average valuation			$95,619,109.00
Less amount employed outside of State $6,436,714. (at 98⅝)				6,348,209.00
				$89,270,900.00

54 EXHIBIT E.

Report of the New York Central and Hudson River R. R. Company for the Year Ending the Thirty-first Day of October, A. D. 1897, Made Pursuant to Provisions of § 182, Chap. 908, Laws of 1896.

GRAND CENTRAL STATION,
NEW YORK, November 15th, 1897.

To the comptroller of the State of New York:

Agreeably to law, as treasurer of the above company, I make the following report, viz:

1. This company began business in the State of New York, in the month of November, 1869.

2. The last report made by this company to the comptroller of the State of New York under the provisions of the above act was made for the year ending November 1st, 1896.

3. Value of real estate and of interest or interests in real property in New York State, and w-ere situated ..... Cannot give.

4. Organized under the laws of the State of New York.

5. Date of organization of the company, November 1, 1869.

6. Total authorized capital of company.....	$100,000,000 00
7. Whole number of shares of stock authorized..	1,000,000 00
8. Number of shares of stock issued.....	1,000,000 00
9. Par value of each share.....	100 00
10. Amount paid into the treasury of the company on each share.....	See answers to Nos. 8 and 9.
11. Amount paid in.....	
12. Amount of capital upon which dividends were declared.....	$100,000,000 00
13. Date of each dividend payable, January 15, April 15, July 15, October 15.	
14. Amount of each dividend declared.....	1,000,000 00

15. Rate per cent. per annum of dividends, four per cent.

16. The business transacted by the company in the State of New York for the year ending November 1st, 1897, was as follows, viz: Transportation.

17. And such business was carried on at the following-named place or places: Very numerous places.

18. Capital stock employed in New York State...	91,192,124 00

19. If not in New York State, where and how employed.....

Property permanently employed and invested outside of New York State.

20. Highest price of sales of stock during the year aforesaid, 115½.

21. Lowest price of sales of stock during the year aforesaid, 92½.

E. V. W. ROSSITER, Treasurer.

STATE OF NEW YORK, County of New York, } ss:

On this twentieth day of November, A. D. 1897, personally appeared before me a notary public in and for the county of New York, Edward V. W. Rossiter, treasurer of the above-named company,
56 who, being duly sworn according to law, did depose and say, that the foregoing report is just, true and correct according as the accounts stand in the books of the company, and that it includes all dividends, whether cash, stock, scrip, or of any other character or description, declared by said company during the year ending on the thirty-first day of October, A. D. 1897.

E. V. W. ROSSITER, Treasurer.

Sworn and subscribed before me the day and year aforesaid.

J. P. McMAHON,
Notary Public.

Remarks.

Of the total capital stock of this company the sum of.....	$8,807,876 00
is employed outside of the State as follows:	
1. The average amount of rolling stock owned by this company and employed in running outside of the State is.....	$5,411,063 00
(This amount is determined by taking such proportion of the value of the rolling stock as equals the wheelage outside of the State, as compared with the entire wheelage in and out of the State.)	
2. The investments of this company in shares of stock of railroad company, located and permanently engaged outside of this State. Par value $3,923,812, actual value.....	3,396,813 00
Total capital employed outside the State.....	$8,807,876 00

57 22. Names and addresses of other companies whose property is leased by company making report.

1. New York & Harlem R. R. Company.
2. Troy & Greenbush Railroad Association.
3. Spuyten Duyvil & Port Morris R. R. Co.
4. West Shore Railroad Company.
5. New Jersey Junction R. R. Company.
6. Rome, Watertown & Ogdensburg R. R. Co.
7. Oswego & Rome Railroad Company.
8. Niagara Falls Branch R. R. Co.
9. Utica & Black River Railroad Co.

in the cause on the 13th day of January, 1903, modifying the order of the appellate division, as indicated in the opinion of Haight, judge, a copy whereof is hereto annexed.

82 The said judgment of the court of appeals having remitted the proceedings to the comptroller, to assess the tax accordingly, without costs to either party, and further ordering that the record of the said proceedings in the court of appeals be remitted to the supreme court, according to the terms of the statute in such case made and provided, to be enforced according to law.

Now, therefore, on reading and filing the said remittitur of the court of appeals, and on motion of Hon. John Cunneen, attorney general, of counsel for the defendant, it is

Ordered and adjudged, that the judgment of the said court of appeals be, and the same hereby is, made the judgment of this court.

D. CADY HERRICK,
Jus. Sup. Ct.

STATE OF NEW YORK,
County of Albany, Clerk's Office, } ss:

I, John Franey, clerk of the said county, and also clerk of the supreme and county courts, being courts of record held therein, do hereby certify that I have compared the annexed copy — remittitur, record and judgment with the original thereof, filed in this office on the 14th day of February, 1903, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 7th day of July, 1904.

[SEAL.] JOHN FRANEY, Clerk.

83 In the Court of Appeals of the State of New York.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* THE NEW YORK Central and Hudson River Railroad Company, Appellant and Respondent,

v.

ERASTUS C. KNIGHT, as Comptroller of the State of New York, Respondent and Appellant.

Cross-appeals from an order of the appellate division of the supreme court in the third judicial department, entered September 20, 1902, which modified and affirmed as modified a determination of the defendant assessing a franchise tax against the relator for the year ending October 31, 1900.

The facts, so far as material, are stated in the opinion.

Opinion of the court per HAIGHT, J.:

"I concur in the conclusions reached by O'Brien, J., except as to that part thereof which holds that the item of $15,230,186.06 is not

taxable. The court below found that this item represented the rolling stock employed outside of the State, it 'being such proportion of all of relator's rolling stock as the mileage thereof without the State bears to the entire mileage of said rolling stock.' As I understand this finding it is to the effect that the rolling stock of the relator is used in this State and outside of the State; that is, cars are loaded at some point in the State, as for instance in the city of New York,
and run over the relator's road to some other point, say, the
84 city of Buffalo. They then are transferred on to other roads
and are run to points outside of the State where they are unloaded and then reloaded and returned to this State. The entire mileage includes that traveled in this State as well as that out of the State; this, with the distance traveled outside of the State and the total value of the stock, furnishes the proportion upon which the computation is made.

The question is as to whether this stock is taxable under the statute. The relator is a domestic corporation. It owns the rolling stock. It is used upon its lines of railroad in this State. True, the cars are transferred on to other roads and are run outside of the State for the purpose of facilitating the transportation of persons and freight without change of cars or of breaking bulk, but the use of the cars outside of the State is but temporary, for they are returned as soon as reloaded and are again used in the transportation of persons and property within this State. It seems to me, therefore, that, under a fair and reasonable construction of the statute this item should have been included as capital employed within this State.

Under the findings of the court below, as we understand them, the average amount of the relator's capital stock during the year was $108,750,000; the average price was $129.8125, making the average cash value of the relator's capital stock for the year $141,171,093.75. The entire amount of the relator's total assets was $337,760,785.52, and the portion of such assets as used in this State $205,029,380.45, to which sum should be added the relator's rolling stock, $15,230,186.06, making the total assets used within the State $220,259,566.51. The statement would thus be—

85 x : 141,171,093.75 : : 220,259,566.51 : 337,760,785.52. Under this statement x = $92,060,076.91, the amount to be assessed at one and one-half mills, which amounts to $138,090.11.

In view of the fact that there is no express finding by the comptroller that none of the relator's rolling stock was used exclusively outside of the State, I think it advisable that the proceedings should be remitted to the comptroller, to the end that further evidence may be taken upon that subject in case it should be claimed that some portion of the relator's rolling stock was used continuously outside of the State, and if it should be found that such was the fact, the amount thereof should be deducted and the order of the appellate division and that of the comptroller should be modified accordingly, without cost to either party."

Opinion per O'BRIEN, J.:

"This appeal presents a controversy between the relator and the State concerning the amount of the annual franchise tax for the year ending October 31, 1900. The statute prescribes that this tax must be computed upon the basis of the amount of the relator's capital stock employed within the State. The main contention of the learned counsel for the relator is that the computation should be made upon the stock so employed at its par and not its actual value, and, hence, the determination now here for review is erroneous since the computation was made upon the latter principle. The language of section 182 of the tax law would seem to support the relator's contention, but this court has recently held that this section must be read with section 190, and when so read the basis for the tax is the actual and not the par value of the stock.
86 (People *ex rel.* N. Y. & E. R. Ferry Co. *v.* Roberts, 168 N. Y. 14.) In the present case it would, doubtless, be to the advantage of the relator to have the tax based upon the par value of the stock, since that value is much less than the actual value and the dividends are only five per cent., but in case of a corporation that had paid even a smaller dividend and whose stock was much below par it would be decidedly to its disadvantage. By reading the two sections together absurd and unequal results are avoided. The two sections are apparently conflicting. In such cases it is the duty of courts to reconcile contradictory or conflicting provisions when possible, and the case cited is a precise authority for the principle that the tax should be based upon the actual value. This permits the statute to operate in a way that is reasonable and just while the other view would render it even more confusing than it now is. Courts cannot always follow logical reasons when dealing with a complicated statute constructed without much method or system in the arrangement of its different parts and lacking in clearness and precision of language.

Passing from this question of construction, there is nothing left of the controversy on either side save the proper application of the rule and the principles upon which the actual value of the relator's capital in this State is to be ascertained. With respect to this question it should be noted at the outset that the writ of certiorari was made returnable at the appellate division and the issues were there tried and heard upon the relator's petition, the writ and the return of the comptroller, including the papers attached thereto. The general and primary question that the court had before it for decision was one of fact, and that was the actual value of that
87 part of the relator's capital employed within this State, and upon that question the learned court made findings upon which its general conclusion is based. In the main we think these findings are correct. There is one item of property which the court found, as matter of fact, to be employed outside the State, which, nevertheless, it felt constrained for some reason that does not dis-

tinctly appear to include as part of the property or capital stock employed in this State. It may be that this is an inadvertence or oversight, but it will be referred to more fully hereafter. The learned court in stating the account excluded certain items of property which the learned attorney-general contended and still insists should be included, and the ground upon which they were excluded from the calculation was that they either represented property employed outside the State or did not in any legal sense constitute capital at all. A very brief reference to these items will show that the action of the court below was correct.

(1.) The relator held $90,578,400 of the stock of the Lake Shore and Michigan Southern Railway Company and $18,900,825 in the Michigan Central Railroad Company. This stock was part of the relator's capital or general assets. Both companies are foreign corporations, the former being partly within and partly without the State and the latter entirely without the State. This stock was purchased by the relator by the issue of bonds and the stock was pledged to a trust company as collateral security for the payment of the bonds. The relator being the owner of these stocks, they constituted part of its capital, but that part of its capital was not employed within this State, and so this court has held. (People *ex rel.* Edison El. L. Co. *v.* Campbell, 138 N. Y., 543; People *ex rel.* Edison El. L. Co. *v.*
88 Wemple, 148 N. Y. 690.) In the former case Judge Earl, speaking for this court, said: 'The stock which the relator took in companies organized outside of this State stood for so much of the relator's capital invested outside of the State. It took a portion of its capital, to wit, a portion of its patent rights, and employed it outside of the State to purchase those stocks. Its property in those corporations represented by its shares of stock was outside of this State and was in no sense employed here. Those stocks had no *situs* here and were not taxable here under any system of taxation which has ever existed in this State.' In the case at bar the stock was purchased, not with patent rights, but with the bonds of the company sought to be taxed. The form of the consideration, however, can make no difference, and so long as that part of the relator's capital represented by the purchase was employed outside of the State it should not be included. Nor can it be important that the stock had for convenience been used as a security upon deposit as collateral for the bonds in a trust company located in this State.

(2.) The court below found that a certain portion of the relator's rolling stock, that is to say, its cars, both freight and passenger, was employed outside the State, the proportion being estimated on the mileage or wheelage basis at $15,230,186.06. The court excluded this item from the calculation on the authority of People *ex rel.* Lackawanna Transp't'n Co. *v.* Knight (75 App. Div. 164). It was there held that the term 'employed within this State,' used in section 182, did not mean simply the legal *situs* of the property, and this principle was decided in other cases. (People *ex rel.* Chicago Junction, etc., Co. *v.* Roberts, 154 N. Y., 1; People *ex rel.* Washington Mills Co.

v. Roberts, 8 App. Div. 201; affirmed on opinion below, 151
89 N. Y., 619.) It is obvious that since the relator is a great interstate railroad traversing the continent that a large proportion, or at least some, of its rolling stock must be always employed outside of the State. It may be that the *situs* of all the relator's property is in the State of its creation, but, as already remarked, the question is not where the *situs* is, but where the property is employed. It may be that various States through which the relator's railroad is operated impose taxes upon such part of its property as upon the basis adopted here is found to be employed in these States respectively, so we think that the learned court below was correct in excluding this item from the estimate of the relator's property employed within this State. The relator is practically operating a continuous line of railroad from New York to Chicago and beyond. It not only owns nearly $110,000,000 of the stock of the western connecting roads, as shown by the record, but is operating these roads as western connections either under leases or traffic agreements. It is practically the owner of these roads just as it is the owner of the West Shore in this State. The operations of the Central do not stop at Buffalo, but extend beyond and through Canada and various Western States. It owns these western roads by practically as good a title as it owns the West Shore, in this State, and hence, as already observed, it is operating a continuous line of railroad from the Atlantic seaboard through various States of the West. The part of the line beyond the limits of this State is longer than that part from New York to Buffalo, and the local and through traffic is immense. Therefore, to contend that all the rolling stock of the relator is 'employed in this State' would seem to me to be an indefensible position. Certainly some of it must necessarily be employed in other States.
90 It cannot all be employed at the eastern end of the line. If so, then the part of the rolling stock employed outside and inside of this State is a question of fact and the court below has found that a designated part of the rolling stock is employed without the State. This court has no power to interfere with that result unless it can say that there is absolutely no evidence in support of the finding. It cannot say that for the plain reason that, as appears from the record, there was evidence on that subject and no one claims otherwise. It has the power to say that, granting to the full extent the fact found as to the employment of part of the rolling stock out of this State, yet as matter of law, since the relator is a domestic corporation and the *situs* of all its personal property is here, all the rolling stock is employed in this State. But such a decision would seem to me to be not only plainly wrong in principle, but sharply opposed to many decisions of this court, some of which are cited above. The stock of the western railroads, amounting to nearly $110,000,000, and the coal and other personal property that we have just held is not employed in the State, is owned and held here in just the same sense as the rolling stock, and why this property is employed outside the State, and all the rolling stock within the

State is not made very clear to me, and, therefore, I am in favor of accepting the finding of the trial court that a certain and designated part of the cars and engines of the relator are employed outside of the State.

(3.) The learned court below found that three other items of the relator's property, amounting in the aggregate to $1,236,871.17, was not capital at all, or at least was not employed in this State.
91 This general item was made up of the sum of $965,217 97 for 'anticipated dividends' on stock of other corporations which the relator owned. The dividends had not been declared, and were, therefore, a mere incident to the stock. It seems to be conceded by both parties that this item was properly excluded. The second item embraced in the general amount above stated was $171,653.20 for bills receivable. This sum appears to have been made up of expenditures by the relator on leased lines. No direct return is expected for these expenditures and the relator holds no obligation for reimbursement, although carried on the books as 'bills receivable,' and so the court below properly held that this item constituted no part of the relator's property within this State for the purposes of the franchise tax. The third item entering into the general sum above stated was $100,000 for coal and supplies without the State. It is hardly conceivable that all the coal which the relator uses in the operation of its railroad can be said to be employed within this State, and so this item was properly found to be property not employed in this State. There was no error in the decision of the court below excluding these three items from the calculation.

(4.) The relator owned $2,597,400 of the capital stock of the Merchants Dispatch Transportation Company, a domestic corporation engaged in the transportation business. Eighty-nine per cent. of that amount, or $2,311,686, represented business of that company outside the State, and although these facts are found by the learned court below, it included the latter amount in its valuation of the relator's property employed within this State. Since the relator's holdings in this company were employed outside the State we think they should not be included in the calculation under the authorities cited above. It is very difficult
92 to see how a distinction was made between those items and the other items referred to which the learned court below excluded. It seems to have been assumed that since this stock was that of a domestic corporation it constituted a part of the relator's property employed in this State; but, as already observed, the legal *situs* of the property does not determine the question, and since the learned court below found that the transportation company that issued the stock employed the capital represented thereby outside the State it is difficult to understand how the relator, by the mere fact of its ownership of the stock, could employ the capital represented by it in this State. With respect to this item, we think that the de-

cision of the learned court below should be corrected by the proper modification.

By a process of calculation which is not questioned here by either party, except as to the matters above referred to, the learned court below found, as stated in the opinion, that the amount of the relator's capital employed within this State upon which the tax should be computed was $90,151,825.98, but since that amount was the result of an error in including a portion of the stock of the transportation company employed without the State, namely, the sum of $2,311,686, the calculation and estimate should be corrected upon the principles adopted as to the other items, and this process which seems to have been finally adopted by the court below in the official report of the case, will give the following result: The percentage of its entire capital employed within the State during the year was .60702, or over sixty per cent. The average amount of its entire capital stock at par was $108,750,000, and the average share price was $129.8125, making the average value for the average amount of stock
93 $141,171,093.75, and the amount upon which the tax of one and one-half mills should be computed $85,694,383.18, and the amount of the tax $128,541.57. There is a material discrepancy between the amount upon which the tax is to be computed as stated in the opinion of the learned court below and that stated in the findings. In the former, as already observed, the amount stated as the basis of the tax is $90,151,825.98 and the tax $136,227.73, while the actual finding of the court is that the amount upon which the tax should have been and should be computed is $86,659,287.62, and the tax should have been and should be $129,988.93. The discrepancy may, no doubt, be accounted for by assuming that the court below, in making up the judgment, did not follow the opinion. However that may be, it will be seen that the result expressed in the findings below makes the tax somewhat larger than the result at which we have arrived. The opinion of the court below as found in the record differs materially from that contained in the official report of the case (75 App. Div. 169). In the latter the case seems to be decided upon the principles herein stated, the slight differences in results being due to an error in the figures.

The order of the appellate division should be modified accordingly, with costs to the relator in this court."

Parker, Ch. J., Bartlett, Martin and Cullen, JJ., concur with Haight, J.; O'Brien, J., reads for modification of order; Vann, J., absent.

Ordered accordingly.

94 [Endorsed:] In the court of appeals of the State of New York. The People of the State of New York *ex rel.* The New York Central and Hudson River Railroad Company, app'l't & resp't, against Erastus C. Knight, as comptroller of the State of New York, resp't & app'l't. Opinion.

95 In the Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of The New York Central and Hudson River Railroad Company
against
NATHAN L. MILLER, as Comptroller of the State of New York.

Papers on Appeal from Order, Proceeding for 1900.

Ira A. Place, attorney for appellant, Grand Central station, borough of Manhattan, N. Y. city, N. Y.
John Cunneen, attorney-general, attorney for respondent, capitol, Albany, N. Y.

96 Notice of Application for an Order for a Writ of Certiorari and for Writ.

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of The New York Central and Hudson River Railroad Company
against
NATHAN L. MILLER, as Comptroller of the State of New York.

SIR: Please take notice that a motion will be made by and on behalf of the New York Central and Hudson River Railroad Company, at a special term of the supreme court in and for the county of Albany, to be held at the city hall in the city of Albany, N. Y., on the 13th day of June, 1903, at 10.30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order for a writ of certiorari, and also for a writ of certiorari, to be directed to you, to review the determination of the comptroller of the State of New
97 York, dated April 23, 1903, a copy of which is hereto annexed, to be returnable according to law, and for such other and further relief as may be proper.

Dated New York, May 20, 1903.

Yours, &c.,
IRA A. PLACE,
Attorney for Appellant, The New York Central and Hudson River Railroad Company.

Room 417, Grand Central station, borough of Manhattan, New York city, N. Y.

To Hon. Nathan L. Miller, comptroller of the State of New York, Albany, N. Y.

98 STATE OF NEW YORK, COMPTROLLER'S OFFICE,
ALBANY, April 23, 1903.

In the Matter of THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* N. Y. C. & H. R. R. R. Co., Appellant-Respondent,
vs.
ERASTUS C. KNIGHT, as Comptroller of the State of New York, Respondent and Appellant.

The proceedings in the above-entitled action having been, by order of the court of appeals, dated January 13, 1903, remitted to the comptroller to take evidence and determine as to whether any portion of the relator's rolling stock was, during the year in question, exclusively or continuously without the State of New York, and testimony having been submitted upon said question and due consideration having been given thereto, it is hereby found and determined that none of the rolling stock of the relator, the said N. Y. C. & H. R. R. R. Co. was during the year in question continuously or exclusively employed without the State of New York, and
99 that the said relator is not entitled to any reduction from the amount found assessable by said judgment of the court of appeals, on account of the employment of any rolling stock outside the State of New York during the year in question.

NATHAN L. MILLER,
Comptroller.

The N. Y. C. & H. R. R. R. Co., New York Central station, New York city.

100 Order for Issuance of Writ of Certiorari.

At a special term of the supreme court held in and for the county of Albany, at the city hall in the city of Albany, N. Y., on the 13th day of June, 1903.

Present: D. Cady Herrick, justice.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of The New York Central and Hudson River Railroad Company
against
NATHAN L. MILLER, as Comptroller of the State of New York.

On reading and filing the petition verified and dated the 10th day of June, 1903, of the New York Central and Hudson River Railroad Company, and upon the undertaking heretofore filed by the said railroad company, pursuant to section 197 of the tax law, and upon the notice of this application duly served on the comptroller of the State of New York, and after hearing William T. Rudd, of counsel for the petitioner, and John Cunneen, attorney general,

for the State comptroller, and on motion of Ira A. Place, Esq., attorney for the petitioner, it is

101 Ordered, that a writ of certiorari do issue from and out of this court, pursuant to the prayer of the petitioner, directed to Nathan L. Miller, as comptroller of the State of New York, to review the decision and determination of the comptroller mentioned and described in the petition, and the question involving the merits therein mentioned, both upon the law and the facts, which writ shall be returnable within twenty days after service thereof upon the said comptroller, at the office of the clerk of Albany county.

Enter.

D. CADY HERRICK, Justice.

102 Writ of Certiorari.

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of The New York Central and Hudson River Railroad Company

against

NATHAN L. MILLER, as Comptroller of the State of New York.

Whereas, we have been informed by the verified petition of the New York Central and Hudson River Railroad Company, dated and verified the 10th day of June, 1903, that certain proceedings have been had before the comptroller of the State of New York in a certain matter entitled "In the matter of The People of the State of New York *ex rel.* N. Y. C. & H. R. R. R. Co., appellant, respondent, *vs.* Erastus C. Knight, as comptroller of the State of New York, respondent and appellant," upon the application of the said railroad company to revise and readjust an account heretofore audited and stated by the said comptroller of the State of New York for taxes to be paid by the said The New York Central and Hudson River Railroad Company under section 182 of the tax law, which said application was made February 14, 1903, and a hearing upon such application having been had on the 19th day of February, 1903, and the said comptroller having thereafter made his determination upon such application to the applicant, the petitioner herein, deny-

103 ing the application and declining to make any revision or readjustment of the said account, and the said The New York Central and Hudson River Railroad Company having now made application to this court for a writ of certiorari to review the said decision and determination of the said comptroller,

And we being willing for such purposes to be certified of such proceedings, if any such were had, do hereby command and strictly enjoin Nathan L. Miller, as comptroller of the State of New York, that he certify and return all and singular the evidence before him

on such application, and all the proceedings thereon, and all his decisions and actions in the premises, with all the evidence, documents, reports, records and papers relating thereto in his possession or under his control, submitted to or considered by him, concerning the said account, and the grounds of his refusal to revise and readjust the same, within twenty days after the service upon him of this writ, at the office of the clerk of Albany county, under his proper hand, pursuant to the provisions of the tax law and the provisions of title II. of chapter 16 of the Code of Civil Procedure, so that our supreme court may further cause to be done thereon what of right and according to law ought to be done, and let the defendant have then and there this writ.

Witness the Hon. D. Cady Herrick, justice of our honorable court, at the court house in the city of Albany, N. Y., this 13th day of June, 1903.

JOHN FRANEY, Clerk.

IRA A. PLACE,
Attorney for the Relator, Grand Central Station,
Borough of Manhattan, N. Y. City, N. Y.

The above writ is hereby allowed this 13th day of June, 1903.

D. CADY HERRICK,
Justice Supreme Court.

104 Petition for Writ.

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of The New York Central and Hudson River Railroad Company
against
NATHAN L. MILLER, as Comptroller of the State of New York.

To the supreme court of the State of New York:

The petition of the New York Central and Hudson River Railroad Company respectfully shows:

I. This petitioner, The New York Central and Hudson River Railroad Company, is a domestic railroad corporation, having but one kind of capital stock, organized and existing under the laws of the State of New York, for steam surface railroad purposes, and is engaged in operating certain railroads owned or leased in the State of New York, and certain railroads leased in other States, and was such railroad corporation during the year ending October 31, 1900.

II. The defendant, Nathan L. Miller, is and has been since December 30, 1901, the comptroller of the State of New York.

105 III. That on or before November fifteenth, 1900, this petitioner duly made a written report to the comptroller of the State of New York, as required by subdivision 1 of section 189 of

the tax law of the State of New York, being chapter 908 of the Laws of 1896 of the State of New York.

IV. That the said report showed the condition of this petitioner at the close of its business on October 31st preceding, and stated the amount of its authorized capital stock to be $115,000,000; that the amount of stock paid in up to April 1, 1900, was $100,000,000; that the amount of stock paid in on and after April 1, 1900, was $115,000,000; that the year ending with said 31st day of October was as follows: January 15, April 16, July 16, October 15, 1900; that the rate per centum of each of said dividends was five per centum; that such dividends amounted to less than six per centum on the par value of the capital stock of this petitioner; that the entire amount of the capital of such corporation, this petitioner, was $338,897,656.69; and that the capital employed by such corporation, this petitioner, in this State during the year ending said October 31, 1900, was $204,587,574.76; and that the capital employed by such corporation, this petitioner, outside of the State of New York, during such year was $134,310,081.93; that is, the proportion or percentage of capital employed by it within the State was sixty and thirty-seven one hundredths (60 37–100) per cent. of the entire amount of its capital and the proportion or percentage of capital employed by it outside of this State was thirty-nine and sixty-three one-hundredths (39 63–100) per cent. of the entire amount of its capital; and that, therefore, from November 1, 1899, to March 31, 1900, both inclusive, $60,370,000 was such portion of the capital stock at par of such corporation, this petitioner, as the amount of capital employed
106 within this State bears to the entire capital of the corporation; and that from April 1, 1900, to October 31, 1900, both inclusive, $69,425,500 was such portion of the capital stock at par of such corporation, this petitioner, as the amount of capital employed within this State bore to the entire capital of the corporation.

V. That subsequent to the said fifteenth day of November, 1900, the said comptroller audited and stated the account for taxes to be paid by this petitioner under section 182 of the tax law, and sent notice thereof to this petitioner.

VI. That the account so audited and stated was in the words and figures following, to wit:

"COMPTROLLER'S OFFICE, ALBANY, N. Y.

The N. Y. Central & H. R. R. R. Co., Grand Central Station, N. Y. City.

G. S. Prince in Account with the State of New York, Dr.

For tax on franchise or business, based on value of capital stock employed in New York State, per chapter 908, Laws of 1896, and acts amendatory thereof, for the year ending October 31, 1900, as per report filed.....	
Appraised value of capital stock, $106,000,000, tax 1½ mills.....	$159,000.00

78 Defendant's Notice of Appeal to Court of Appeals.

Supreme Court, County of Albany, State of New York.

PEOPLE *ex Rel.* NEW YORK CENTRAL & HUDSON RIVER RAILroad Company, Plaintiff,
against
ERASTUS C. KNIGHT, as Comptroller of the State of New York, Defendant.

GENTLEMEN: Please take notice that the defendant in the above-entitled action appeals to the court of appeals from the order of the appellate division, third department, and also from the judgment therein entered in the clerk's office of the county of Albany on the 20th day of September, 1902, in favor of relator, against the said defendant, modifying the determination of the comptroller herein and reducing relator's taxes by $29,011.07, with interest, and for $199.25 costs and disbursements and from the whole of said order and judgment.

Dated at Albany, N. Y., September 29, 1902.

Yours, &c.,
JOHN C. DAVIES,
Attorney-General, Attorney for Defendant,
Capitol, Albany, N. Y.

To the clerk of the county of Albany, Ira A. Place, Esq., attorney for the relator, 417 Grand Central station, N. Y. city.

79 Relator's Notice of Appeal to Court of Appeals.

Supreme Court, County of Albany.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of the New York Central and Hudson River Railroad Company, Relator,
against
ERASTUS C. KNIGHT, as Comptroller of the State of New York, Respondent.
Notice of Appeal to Court of Appeals.

SIRS: Please take notice, that the relator in the above-entitled action hereby appeals to the court of appeals from the order of the appellate division of the supreme court, third department, and also from the judgment of said appellate division thereon, entered herein in the clerk's office of the county of Albany, on the 20th day of September, 1902, and from each and every part of said order and judgment.

Dated New York, October 18, 1902.

Yours, &c.,
IRA A. PLACE,
Attorney for Relator, Room 417, Grand Central Station,
Borough of Manhattan, New York City, N. Y.

To John C. Davies, Esq., attorney for respondent, capitol Albany, N. Y., and clerk of the county of Albany, Albany, N. Y.

80 Stipulation.

In the Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of the New York Central and Hudson River Railroad Company, Appellant and Respondent,
against
ERASTUS C. KNIGHT, as Comptroller of the State of New York, Respondent and Appellant.

Stipulation under Sections 3301 and 1353 of the Code of Civil Procedure.

It is hereby stipulated, under section 3301 of the Code of Civil Procedure, that the foregoing are true copies of the notices of appeal, the order and judgment appealed from and the papers upon which the court below acted in making said order and judgment, on file in the office of the clerk of Albany county, and certification thereof, as required by section 1353 of the Code of Civil Procedure, is hereby waived.

Dated borough of Manhattan, New York city, October 20, 1902.

IRA A. PLACE,
Attorney for Appellant-Respondent.
JOHN C. DAVIES,
Attorney-General, Attorney for Respondent-Appellant.

81 At a special term of the supreme court of the State of New York, held at the city hall, in the city of Albany, N. Y., on the 14th day of February, 1903, for the county of Albany.

Present: Hon. D. Cady Herrick, justice.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of the New York Central and Hudson River Railroad Company
vs.
ERASTUS C. KNIGHT, as Comptroller of the State of New York.

The above entitled cause having been taken to the court of appeals from an order and judgment of the appellate division, third department, entered and filed in the office of the clerk of the county of Albany on the 20th day of September, 1902, modifying the determination of the comptroller of the State of New York, settling a tax against the relator, for the year ending October 31, 1900, in the sum of one hundred fifty-nine thousand dollars, and further ordering that the said comptroller's account therefor be corrected and restated by him, and that the said tax be reduced by the sum of $29,011.07, with interest from the date of the deposit thereof by the relator with the State treasurer, and for costs in favor of the relator in the sum of $199.25; and the said court of appeals having rendered judgment

the State, $220,259,566.51. The statement would thus be x : 141,171,093.75 : : 220,259,566.51 : 337,760,785.52.

Under this statement x $92,060,076.91, the amount to be assessed at one and one-half mills, which amounts to $138,090.11.

In view of the fact that there is no express finding by the comptroller that none of the relator's rolling stock was used exclusively outside of the State, I think it advisable that the proceedings should be remitted to the comptroller, to the end that further evidence may be taken upon the subject in case it should be claimed that some portion of the relator's rolling stock was used continuously outside of the State, and if it should be found that such was the fact, the amount thereof should be deducted and the order of the appellate division and that of the comptroller should be modified accordingly."

That the said judgment of the court of appeals was on the 14th day of February, 1903, in and by the order and judgment of the supreme court of the State of New York, at a special term thereof held in and for the county of Albany, made the judgment of that court and duly entered as such.

That upon the application of this petitioner the comptroller of the State of New York on February 14, 1903, fixed February
111 19, 1903, as the day of and for the re-hearing of petitioner's application for the revision and readjustment of so much of the said tax as was based upon the equipment of petitioner continuously employed outside this State during said tax year in pursuance of the said judgment of the court of appeals in that behalf; that on the 19th day of February, 1903, the applicant, this petitioner, appeared by its counsel before the Honorable Otto Kelsey, the deputy comptroller, representing the said comptroller of the State of New York, and gave testimony in support of the said application, whereby, upon the said hearing, it appeared that the item "Cost of road and equipment $181,304,316.21" shown in and upon the report made by said applicant, this petitioner, to the comptroller of the State of New York for the said tax year ending October 31, 1900, embraced and included the cost of its total equipment, to wit, $44,238,069.25.

That the road mileage operated by said applicant, this petitioner, and upon which it employed such and so much of its equipment as it did employ during said tax year, was 2,828.68 miles, of which 2,483.61 miles, or 87.80% of the total road mileage was situate within the State of New York, and 345.07 miles, or 12.20% of the total road mileage was situate outside the State of New York. That by the said evidence upon the said hearing it further appeared that the said $44,238,069.25 cost of total equipment embraced and included $27,911,210.90 cost of freight cars, and that the said freight cars were not employed or used solely by petitioner, or solely upon its road and other railroads commonly known as New York Central lines or Vanderbilt lines; that whereas the total car mileage of petitioner's said freight cars during said tax year was 540,074,721 miles only, and no more than 363,563,540 miles thereof, or

67.32% of the said total mileage thereof was within the State
112 of New York, or upon so called New York Central lines or Vanderbilt lines within and outside the State of New York, that is to say upon lines of railroad of or in any wise controlled by said applicant, this petitioner, and 176,511,181 miles of the said total car mileage, or 32.68 % thereof, was employed and used by other railroad companies upon their roads outside the State of New York, and other than the railroads in anywise controlled by applicant, this petitioner, and thus used in and about the local and interchange business and traffic of said outside and foreign railroad companies distinct from and disconnected with the business and traffic of and with the applicant, this petitioner, wherein and whereby $9,121,383.72 of the said $44,238,069.25 total equipment was continuously employed and used by others than the applicant, this petitioner, and upon roads entirely outside of the State of New York, and roads in no wise controlled by the applicant, and in and about business and traffic distinct from the business and traffic of the applicant, this petitioner,

and that of the balance, viz: $35,116,685.53 of said total equipment, 12.20 %, to-wit $4,284,235.64, was as aforesaid employed and used by the applicant, this petitioner, upon its said road mileage outside of the State of New York, and thus it appeared that the basis and sum of credit to which the applicant, this petitioner, was entitled, conformable to the said direction of the court of appeals, was the following, to wit:

Computation on basis adopted by the court of appeals: x : 141,171,093.75 : : 220,259,566.51 : 337,760,785.52.

Under this statement x = $92,060,076.91, the amount to be assessed at one and one-half mills, which amounts to $138,090.11.

Computation on basis of $27,911,210.90 total freight cars, of
113 which 32.68 %, viz., $9,121,383.72 was employed by others than petitioner, and on other than Vanderbilt lines, and entirely outside N. Y. State; and $44,238,069.25 total equipment, less $9,121,383.72, as above, viz: $35,116,685.53, of which 12.20 %, viz: $4,284,235.64, was employed by petitioner on its road mileage outside N. Y. State; total equipment continuously employed outside N. Y. State, $13,405,619.36.

The statement would thus be: x : 141,171,093.75 : : 206,853,947.15 : 337,760,785.52.

Under this statement x = $86,457,043.62, the amount to be assessed at one and one-half mills, which amounts to $129,685.57. Entitling petitioner to credit of the difference between $138,090.11 and $129,685.57, viz: $8,404.54, and this applicant was accordingly entitled to a resettlement of the said tax and credit of the said sum of $8,404.54 in respect and on account thereof.

That thereafter the said comptroller made his determination, and sent written notice of his determination upon said application to the applicant, this petitioner, the said determination being as follows:

114 "STATE OF NEW YORK, COMPTROLLER'S OFFICE,
ALBANY, April 23, 1903.

In the Matter of THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* N. Y. C. & H. R. R. R. Co., Appellant-Respondent,
vs.
ERASTUS C. KNIGHT, as Comptroller of the State of New York, Respondent and Appellant.

The proceedings in the above-entitled action having been, by order of the court of appeals, dated January 13, 1903, remitted to the comptroller to take evidence and determine as to whether any portion of the relator's rolling stock was during the year in question exclusively or continuously without the State of New York, and testimony having been submitted upon said question and due consideration having been given thereto, it is hereby found and determined that none of the rolling stock of the relator, the said N. Y. C. & H. R. R. R. Co., was, during the year in question, continuously or exclusively employed without the State of New York, and that the said relator is not entitled to any deduction from the amount found assessable by said judgment of the court of appeals, on
115 account of the employment of any rolling stock outside the State of New York during the year in question.

NATHAN L. MILLER,
Comptroller.

The N. Y. C. & H. R. R. R. Co., New York Central station, New York city."

That the said petitioner then insisted, and ever since has insisted and now insists that the said sum of $8,405.54 of the said tax based upon so much of petitioner's capital as is represented in and by the said $13,405,619.36 of its assets, to wit, equipment in manner aforesaid continuously employed outside this State, was unlawfully and erroneously assessed or imposed, and that payment thereof could not and cannot be lawfully demanded, and that under and in pursuance of the said judgment and remittitur of the court of appeals, and the applicant's, this petitioner's, right in the premises, it was entitled to have the said account further resettled by striking therefrom or crediting to the account of the said petitioner the said sum of $8,404.54.

IX. That heretofore this petitioner duly deposited with the treasurer of the State of New York the full amount of the taxes, percentage, interest and other charges audited and stated in the said account, and duly filed an undertaking with the said comptroller in an amount and with sureties approved by a justice of the supreme court of the State of New York, to the effect that if the said writ is dismissed, or the said determination is confirmed, this petitioner will pay any and all charges and costs which may accrue against it

in the prosecution of the writ, including costs of all appeals, a copy of such undertaking being hereto annexed, and marked "Exhibit A."

116 X. That your petitioner is aggrieved by the said determination of the said comptroller. That no previous application for this writ has been made to any court or judge.

Wherefore, your petitioner, desiring to review both upon the law and the facts said determination of the said comptroller, upon such application made to him by your petitioner for a revision and resettlement of the said account as hereinabove set forth, prays that a writ of certiorari may issue out of the supreme court of the State of New York, directed to the said comptroller of the State of New York, commanding the said comptroller to certify and return at the office of the clerk of Albany county all and singular the evidence b[illegible] him on such application, and all the proceedings thereon, and [illegible] his decisions and actions in the premises, with all the evidence, documents, reports, records and papers relating thereto in his possession or under his control, submitted to or considered by him, concerning the said account and the grounds for his refusal to revise and readjust the same, to the end that his said decisions and determinations may be reviewed and the said original and resettled account be corrected and restated, and that this petitioner have such other and further relief as may be proper.

Dated New York, June 10, 1903.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
By E. V. W. ROSSITER, First Vice President.

IRA A. PLACE,
Attorney for Petitioner, Grand Central Station,
Borough of Manhattan, N. Y. City, N. Y.

117 STATE OF NEW YORK, }
County of New York, } ss.:

Edward L. Rossiter, being duly sworn, says that he is an officer of The New York Central and Hudson River Railroad Company, the petitioner above named, to wit: the first vice president thereof; that the foregoing petition is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

E. L. ROSSITER.

Sworn to before me this 10th day of June, 1903.

JOHN A. MATTISON,
Notary Public, N. Y. County.

EXHIBIT A.

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of the New York Central and Hudson River Railroad Company
against
NATHAN L. MILLER, as Comptroller of the State of New York.

Whereas, the above named, The New York Central and
118 Hudson River Railroad Company, heretofore on February 14, 1903, applied to the comptroller of the State of New York to revise and readjust the account heretofore audited and stated by the said comptroller, imposing an annual tax upon the said The New York Central and Hudson River Railroad Company for the year ending October 31st, 1900, under section 182 of the tax law, and to have the said account, under authority of the remittitur of the court of appeals in such behalf, restated by striking therefrom, or by crediting to the account of said railroad company the sum of eight thousand four hundred and four and 54/100 ($8,404.54) dollars, and the said comptroller having thereafter, a hearing having been made upon the said application, made his determination, declining to make any revision or readjustment of the said account; and

Whereas, the said The New York Central and Hudson River Railroad Company is dissatisfied and aggrieved by the said determination and intends to review the same by writ of certiorari, and desires to file an undertaking with the said comptroller, as required by section 197 of the tax law,

Now, therefore, the National Surety Company, a corporation duly authorized by the laws of the State of New York to execute surety bonds, having an office and principal place of business at No. 346 Broadway, borough of Manhattan, city of New York, New York, does hereby undertake that if the said writ of certiorari, which may be granted upon the application of the said The New York Central and Hudson River Railroad Company, to review the said determination, be dismissed, or the determination of the comptroller be confirmed, the said The New York Central and Hudson River Railroad Company will pay all the costs and charges which may accrue against it in the prosecution of the said writ, including the
119 cost of all appeals, not exceeding the sum of five hundred ($500) dollars.

Dated New York, June 10, 1903.

NATIONAL SURETY COMPANY,
[SEAL.] By ROBERT M. NUGENT,
Res. Vice-President.

Attest:
RICHARD J. MORIARTY,
Res. Ass't Secretary.

STATE OF NEW YORK, }
County of New York, } ss.:

On this 10th day of June, 1903, before me personally appeared Robert M. Nugent, res. vice-president of the National Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the county of New York; that he is the res. vice-president of the National Surety Company, the corporation described in, and which executed the within instrument; that he knows the corporate seal of said company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the board of directors of said company; and that he signed said instrument as res. vice-president of said company by like authority; and that the liabilities of said company do not exceed its assets, as ascertained in the manner provided in section 3, chapter 720, of New York Session Laws of 1893. And the said Robert M. Nugent further said that he is acquainted with Richard J. Moriarty, and knows him to be the res. ass't secretary of said company; that the signature of Richard J. Moriarty, subscribed to the said instrument, is in the genuine handwriting of the said Richard J. Moriarty, and was thereto subscribed by the like order
120 of the said board of directors, and in the presence of him, the said Robert M. Nugent, res. vice-president.

[SEAL.] EDITH BALDWIN,
Notary Public for County of Kings, No. 122.

Certificate filed in New York, Westchester, and Richmond counties.

Copy of By-Law.

Be it remembered, that at a regular meeting of the board of directors, of the National Surety Company, duly called and held on the 6th day of February, 1900, a quorum being present, the following by-law was adopted:

"ARTICLE XIII, SEC. 1. Signatures required.—All bonds, recog-
"nizances, contracts of indemnity and other writings obligatory in
"the nature thereof, shall be signed by the president, the vice-presi-
"dent, the second vice-president, a resident vice-president, or an
"attorney in fact, and, except when signed by an attorney in fact,
"shall have the seal of the company affixed thereto, duly attested
"by the secretary, an assistant secretary, or a resident assistant sec-
"retary. The vice-president, second vice-president, and resident
"vice-presidents shall each have authority to sign such instruments
"whether the president be absent or incapacitated or not; and the
"assistant secretaries and resident assistant secretaries shall each
"have authority to seal and attest such instruments, whether the
"secretary be absent or incapacitated or not. All such instruments

"executed as herein provided shall be as binding upon the company "as if the same were signed by the president, duly sealed and attested "by the secretary."

121 STATE OF NEW YORK, County of New York, } ss.:

I, Richard J. Moriarty, res. ass't secretary of the National Surety Company, have compared the foregoing copy of by-law with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original by-law.

Given under my hand and seal of the company, in the city of New York, county of New York, this 10th day of June, 1903.

[SEAL.] RICHARD J. MORIARTY,
Res. Ass't Secretary.

122 Return to Writ of Certiorari.

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of the New York Central and Hudson River Railroad Company, Relator,

vs.

NATHAN L. MILLER, as Comptroller of the State of New York, Defendant.

The comptroller of the State of New York hereby makes return to the writ of certiorari issued herein June 13, 1903, as follows:

1st. He admits the allegations contained in paragraphs I., II., III., V., VI., and IX. of the petition herein.

2d. He also admits that on or about the 30th day of January, 1901, the relator applied for a revision and readjustment of the account stated against it by said comptroller, and that such application was granted and a rehearing thereon had on or about the 15th of July, 1901.

He also admits that thereafter the comptroller made his decision, as stated in paragraph VII. of the petition herein, and that upon the petition of this petitioner to the supreme court of the State of New York the determination of the comptroller was ordered
123 to be and in pursuance of said order was duly certified to the court, and in due course reviewed and determination thereon had by this court, and by said appellate division an order was made modifying the determination of the comptroller, and correcting and restating the account of the relator, from which order and judgment entered thereon appeals were taken to the court of appeals by the relator, and also by the defendant, and the said court of appeals, in the opinions of Judges Haight and O'Brien, reported at 173 N. Y.

Reports, pages 255 *et seq.*, advised the modification of the order and judgment of the appellate division, but finally made its order as follows, contained in the wording of the opinion of Haight, J., the statement within brackets being mine:

"It seems to me, therefore, that, under a fair and reasonable construction of the statute, this item (for rolling stock of relator at times but not continuously without the State of New York) should have been included as capital employed within this State.

"Under the findings of the court below, as we understand them, the average amount of the relator's capital stock during the year was $108,750,000; the average price was $129.8125, making the average cash value of the relator's capital stock for the year $141,171,093.75. The entire amount of the relator's total assets was $337,760,785.52, and the portion of such assets, as used in this State, $205,029,380.45, to which sum should be added the relator's rolling stock, $15,230,186.06, making the total assets used within the State $220,259,566.51. The statement would thus be

x : 141,171,093.75 : : 220,259,566.51 : 337,760,785.52.

Under this statement x = $92,060,076.91, the amount to be
124 assessed at one and one-half mills, which amounts to $138,090.11.

In view of the fact that there is no express finding by the comptroller that none of the relator's rolling stock was used exclusively outside of the State, I think it advisable that the proceedings should be remitted to the comptroller, to the end that further evidence may be taken upon that subject in case it should be claimed that some portion of relator's rolling stock was used continuously outside of the State; and if it should be found that such was the fact, the amount thereof should be deducted and the order of the appellate division and that of the comptroller should be modified accordingly, without costs to either party."

He further admits that the said judgment of the court of appeals was, on the 14th day of February, 1903, in and by the order and judgment of the supreme court of the State of New York, at a special term held in and for the county of Albany, made the judgment of that court, and duly entered as such.

He further admits that on or about the 14th day of February, 1903, the relator applied for a rehearing of its application for a revision and readjustment of its account by the comptroller, to take evidence and determine as to whether or not any portion of the relator's rolling stock was during the year ending October 31, 1900, exclusively or continuously without the State of New York, and such application was granted and a rehearing thereon had on or about February 19, 1903.

He also admits that thereafter the comptroller made his decision thereon, as stated in paragraph VIII. of the petition herein.

3d. Making further return to the said writ the comptroller
125 does not admit any of the allegations of the petition herein, except those herein expressly admitted or shown by this return.

4th. He further returns that said account and determination are in all things legally and properly stated and made and that the relator is not aggrieved thereby.

5th. Annexed hereto and made a part hereof are all the papers and proceedings before the comptroller in stating such account and making such determination, other than those set out in the petition herein.

In witness whereof, I have hereunto set my hand and official seal this 6th day of July, 1903.

OTTO KELSEY,
Deputy Comptroller.

[L. S.]

126 STATE OF NEW YORK:

Comptroller's Office.

In the Matter of the Application of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY for Revision and Readjustment of Taxes Assessed under the Provisions of Chapter 908, Laws of 1896, and the Acts Amendatory Thereof for the Year 1900.

Rehearing held at the office of the State comptroller, February 19th, 1903, before Hon. Otto Kelsey, deputy State comptroller.

Appearances.

Thomas Emery, as counsel.

F. H. MEEDER appeared, and being duly sworn, testified as follows:

By Mr. EMERY: Mr. Meeder, you may state where you live, where, how employed, and in what capacity?

A. Live in South Orange, New Jersey; employed as chief clerk in the office of the auditor of the New York Central and Hudson River Railroad Company.

Q. At the Grand Central station in New York city?

A. Yes, sir.

Q. Had you to do with the making up of the computations
127 and figures for the return of the capital employed by the company in this State for the year ending October 31st, 1900?

A. Yes, sir.

Q. And in that capacity were you and are you familiar with the manner and place of use and employment of the rolling stock and equipment of the company?

A. Yes, sir.

Statement offered in evidence.

Objected to by Mr. Merrill in the form in which it is as incompetent.

By COUNSEL: I would suggest that it be identified, and I ask the preliminary questions.

Mr. MERRILL: Objected to on the general ground that under the remittitur the comptroller is only authorized to take into consideration evidence which shows the value of the rolling stock of the New York Central and Hudson River Railroad Company which is continuously and permanently without the State of New York and not to consider any testimony with relation to wheelage basis or mileage basis.

Statement received and marked Exhibit A, for identification.

Q. Did you make up the computations and statements shown upon the paper Exhibit A for identification, or were they made under your supervision?

A. Yes, sir.

Q. And what have you to say as to the correctness or incorrectness of the statements and figures as therein contained?

A. I believe that the division of the valuation of the company's equipment is a correct one, using the company's road mileage in and out of New York State as a basis.

Q. That is, do you or do you not mean the road mileage operated by the New York Central and Hudson River Railroad Company directly?

A. I mean such mileage operated directly.

Exhibit A for identification offered in evidence.

128 Objected to by Mr. Merrill on the ground that it is not permissible and is incompetent under the remittitur.

By COUNSEL: I will state ground under which I deem it to be receivable, admissible and proper to be received, even though Mr. Merrill were technically and absolutely correct; that is, referring to the opinion which comes down with the remit-ittur, it shows substantially this state of affairs; the opinion shows that the view which the court has of the record as it stood was that the use of the company's rolling stock outside of the State, off of its own road, consisted merely of the accomplishment of the shipment upon which the company started the car to and upon their so-called Vanderbilt or New York Central lines, to wit—the Lake Shore, Michican Central, the Big Four, popularly called, and thereupon the cars were forthwith or presently reloaded and returned to the New York Central Company upon its line. Now, upon that view the court conceived that these cars were to be regarded as stock employed within New York State within the meaning of the statute. Now, in that connection no showing was made of the fact that any part of the company's line was operated—mileage was outside of the State of New York—nor was there any showing in that case either one way or the other that this rolling stock went in these Vanderbilt lines and was held off it. In view of that condition of affairs we offer this in evidence to show what the actual state of affairs was.

By Mr. KELSEY:

Q. That is to determine how much outside and how much in?

A. That is to be regarded how much employed outside of
129 the State and how much inside the State and for that purpose we offer this paper showing division of equipment of the company, showing first the total valuation of the equipment of the company in its various classifications and then the proportion of that value divided as per road mileage operated by the company within and outside the State.

Mr. MERRILL: It is contended that under the order of the court the only thing that we can take into consideration is the cars which are actually and permanently and continuously without the State. They are to be accepted as property without the State and otherwise than that they are to be construed as within the State. There is no ground, I insist, under the remittitur for taking a wheelage basis which the court distinctly turned down in the case which it had before it; if there is no ground for taking wheelage basis there is substantially the same reason why a mileage basis should be accepted. The wording of the remittitur in relation to this is as follows—"In view of the fact that there is no express finding by the comptroller that none of the relator's rolling stock was used exclusively outside of the State, I think it advisable that the proceedings should be remitted to the comptroller, to the end that further evidence may be taken upon the subject in case it should be claimed that some portion of the relator's rolling stock was used continuously outside of the State, and if it should be found that such was the fact, the amount thereof should be deducted and the order of the appellate division and that of the comptroller should be modified accordingly, without costs to either party."

Now, Mr. Comptroller, I contend that under this remittitur
130 the only evidence which the comptroller is authorized to take in this matter is such as is in harmony with and along the lines indicated in the words quoted; that is, such evidence that will show what the value was of the rolling stock of the New — Central and Hudson River Railroad Company, and that was used exclusively and continuously outside of the State of New York during the year in question.

By COUNSEL: My claim is, that viewing the remittitur in the line of the opinion, that this is what fairly tends to establish those facts regarding the words continuously out of the State in their reasonable and ordinary sense, and so we offer that for the purpose of showing that, in view of this road mileage being the proportion shown without the State, that that proportion of equipment is to be regarded as having its situs without the State and being continuously without the State within the fair meaning of the statute prescribing this tax.

Mr. MERRILL: It is contended further on the part of the comptroller that all the evidence was before the court, and the comptroller in the case decided by the court and concerning which this remittitur was handed down, showing the wheelage of these cars without the

State and within the State, and it is contended that the mileage basis is no more just than the wheelage basis, and they wouldn't, either one of them, determine fairly what cars were exclusively and continuously without the State.

By COUNSEL: I submit statement of equipment for October 31st, 1900.

Exhibit A for identification is received as Exhibit A, conditionally, the comptroller reserving the right to exclude it as evidence.

131 Q. Now, Mr. Meeder, the same year for the mileage basis off the Vanderbilt lines?

Statement produced, offered in evidence and marked Exhibit B for identification.

Q. Now, Mr. Meeder, examine the paper marked Exhibit B for identification, and state whether it was prepared and made up by you, or under your supervision and direction?

A. This statement was prepared under my direction and supervision.

Q. And what have you to state as to its correctness as to statements and computations?

A. I believe the computations as shown upon this exhibit to be correct.

Q. And the statements contained in it to which the computations refer?

A. Yes, sir.

Statement offered in evidence.

Objected to on the ground that it is incompetent, irrelevant and immaterial, and cannot be entertained under the conditions of the remittitur.

By COUNSEL: I claim for this that it exhibits the proportion of the rolling stock of the company that was continuously employed both outside the State of New York and off the New York Central lines and the lines controlled by the New York Central.

Mr. MERRILL: I object to it on the ground that it doesn't show anything of that character, but shows the result of a computation, which in result is how many miles of road cars were operated on outside of New York State and how many miles of road cars are operated on in New York State, and how many cars during the year were on those two divisions of mileage.

By COUNSEL:

Q. Mr. Meeder, in this statement marked Exhibit B for identification, Mr. Meeder, the terms Vanderbilt lines are used—please
132 state to what roads those words have reference?

A. The Lake Shore and Michigan Southern railway, the Michigan Central railroad, Cleveland, Cincinnati, Chicago and St. Louis railway, Lake Erie & Western R. R.; N. Y., Chicago & St.

(Return this bill to the comptroller, with draft or check payable to State treasurer.)

The tax specified is due and payable January 15th, 1901. Interest attaches after that date."

VII. That on or about the 30th day of January, 1901, and
107 within one year from the time that the said account had been audited and stated, and notice thereof sent to this petitioner, this petitioner applied to the said comptroller to revise and readjust the said account and to have said account resettled by striking therefrom, or by crediting to the account of this petitioner, the sum of $60,521.46; that the said application was made by written petition, duly verified on or about the 30th day of January, 1901, and entitled, "In the matter of the application of the New York Central and Hudson River Railroad Company for a revision and readjustment of the account heretofore audited and stated by the comptroller of the State of New York for taxes under section 182 of the tax law, for the year ending October 31st, 1900;" that upon such application said comptroller, on or about the 5th day of April, 1901, granted a rehearing, and fixed the first day of May, 1901, as the day upon which the petitioner might be heard upon such application; that said hearing was duly adjourned to the 15th day of July, 1901; that on the said 15th day of July, 1901, this petitioner duly appeared by its counsel before the Honorable Willis E. Merriman, the deputy comptroller, representing the said comptroller, and gave testimony in support of the said application; that upon said hearing it appeared from the revised and corrected figures that of the said sum of $338,897,656.69, this petitioner, as aforesaid, $205,029,380.45 was capital employed by it within this State during such year, and $133,868,276.24 was capital employed by it outside of this State during such year; that is, the proportion of percentage of capital employed by it in this State was sixty and fifty one-hundredths (60 50-100) per cent. of the entire amount of its capital, and the proportion of percentage of capital employed by it outside of this State was thirty-nine and fifty one-hundredths (39 50-100) per cent. of the entire
108 amount of its capital; and that therefore from November 1, 1899, to March 31, 1900, both inclusive, $60,500,000 was such portion of the capital stock at par of such corporation, this petitioner, as the amount of the capital employed within this State bore to the entire capital of said corporation; and that from April 1, 1900, to October 31, 1900, both inclusive, $69,575,000 was such portion of the capital stock at par of such corporation, this petitioner, as the amount of capital employed within this State bore to the entire capital of the corporation; that thereafter the said comptroller made his determination and sent written notice of his determination upon said application to the applicant, this petitioner, the said determination being as follows:

STATE OF NEW YORK:

COMPTROLLER'S OFFICE,
ALBANY, Sept. 13, 1901.

In the Matter of the Application of THE NEW YORK CENTRAL & H. R. R. R. COMPANY for a Revision and Readjustment of Taxes Assessed against it under the Provisions of Chap. 908, Laws of N. Y. 1896, and the Several Acts Amendatory Thereof.

An application having been made by the above-named New York Central & Hudson River R. R. Company for a revision and resettlement of the taxes assessed and determined against it by the
109 comptroller of the State of New York for the one year ending Oct. 31, 1900, and the said comptroller having heard proofs offered on behalf of the said New York Central & Hudson River R. R. Company in support of said application, and after due consideration thereof, the comptroller does determine that the assessment heretofore made against the said New York Central & Hudson River R. R. Co., does not include taxes which could not have been lawfully demanded. and therefore declines to make any revision of readjustment of the same.

THEO. P. GILMAN,
Deputy Comptroller."

VIII. That upon the petition of this petitioner to the supreme court of the State of New York, setting forth, *inter alia*, the aforementioned facts, the said determination of the said comptroller of the State of New York was ordered to be and in pursuance of said order was duly certified to this court and in due course reviewed and determination thereon had by this court in and by the appellate division thereof held in and for the third judicial department of said State and its order modifying and as modified affirming the said determination of the said State comptroller duly entered, from which as well this petitioner as also the said comptroller of the State of New York appealed to the court of appeals of said State.

That upon and by the court of appeals hearing and determination of the said appeal that court adjudged revision and readjustment of the said tax save and except that as to and concerning so much of the said revised and readjusted tax as was based upon the equipment of petitioner employed, respectively, within or outside of this State, it was ordered as follows:

"Under the findings of the court below, as we understand
110 them, the average amount of the relator's capital stock during the year was $108,750,000; the average price was $1.298,125, making the average cash value of the relator's capital stock for the year $141,171,093.75. The entire amount of the relator's total assets was $337,760,785.52, and the portion of such assets as used in this State $205,029,380.45, to which sum should be added the relator's rolling stock, $15,230,186.06, making the total assets used within

COUNSEL: I now offer Exhibit C for identification as Exhibit C.

Objected to by Mr. Merrill as immaterial, incompetent and irrelevant.

Excluded. Exception taken.

COUNSEL: In the light of this further evidence I now renew the offer of Exhibit B for identification, to be included as Exhibit B.

Same objection.

Excluded. Exception taken.

Mr. MERRILL: This Exhibit B for identification is also objected to, further, on the ground that it shows exactly the same method of procedure that was before the court in relation to rolling stock before; that is to say, wheelage, and which was rejected by the court.

By COUNSEL: In response to that the applicant's contention is that the paper is not subject to the objection interposed, because it was not merely the wheelage basis that the court treated as objectionable, but the wheelage basis which it deemed to be involved in the mere shipment from the New York Central railroad proper to points on their lines known as Vanderbilt lines, and then reloading the
136 car back from such so-called Vanderbilt lines to the New York Central, whereas this division of mileage entirely discards the thing that the court thus treated as objectionable. That is to say, we are here claiming as exempt the proportion used on other than Vanderbilt lines, which ground of exemption was not brought before the court at all, so it could not have been passed upon by them.

Mr. MERRILL:

Q. Mr. Meeder, isn't it a fact that during all the time that cars of the New York Central Railroad Company and which were in transit out of the State on other lines, that there were cars of other lines also in the hands of the New York Central Railroad Company in the State of New York?

COUNSEL: I object to that inquiry upon the ground that it is irrelevant, immaterial and incompetent, because we are taxable on our capital employed in the State and not on capital of other companies.

Mr. MERRILL: I think this is pertinent in showing that the New York Central railroad had in lieu of its own property outside of the State property of other companies and had in use their property as though it were its own.

Objection sustained.

Mr. MERRILL: Mr. Comptroller, I want to state that the purpose of making this inquiry was to show that such a condition of affairs did exist.

Mr. MERRILL:

Q. Mr. Meeder, is it not a fact that on much of the mileage of the New York Central Railroad Company in New York State there was

more cars employed per mile than there is upon the mileage
137 of the roads located without the State proportionately?

A. I am not prepared to answer that question positively from my own knowledge.

Q. Mr. Meeder, is it not a fact that upon a wheelage basis a car operated outside the State of New York would wheel many more miles upon the average than it would in doing business that was local to the State of New York?

A. Not necessarily.

Q. Isn't it a fact, whether it was necessarily so or not? For instance, a car loaded at New York city with a car-load of eggs to go to Chicago, even if that car were returned loaded immediately, would travel several times as many miles in going from New York to Chicago and back again outside of the State as it would within the State?

A. Not if it went by the Lake Shore road, for example; it would make about half the distance in New York State and half the distance out.

Q. Suppose the car went still further west, to St. Louis, then?

A. It would make a greater mileage outside of New York provided it returned to New York again.

Q. How did you get the averages in Exhibit B for identification—did you, as a matter of fact, get those by taking a certain number of freight cars, or was it made up generally from the general records of the company and not upon averages?

A. The total freight car mileage shown on Exhibit B, showing the miles run by cars both in and out of New York State, was obtained from the records of the car accountant; the mileage of freight cars outside of New York State on roads other than the Vanderbilt lines was obtained from the same source; the per cent. which this latter figure bears to the former is 32.68; this percentage was applied to the total valuation of the freight cars and gave the result shown on Exhibit B as valuation outside of New York.

138 Q. Now, Mr. Meeder, is it not possible to determine from the records of the New York Central and Hudson River Railroad Company whether there were any cars which did not come into and were not employed by New York Central Railroad Company in New York State during the year in question?

A. If the records of the car accountant are preserved for that period I am of the opinion that it might be determined, but that it would incur a vast amount of labor.

Q. Mr. Meeder, does the New York Central and Hudson River Railroad Company, as a corporation, operate any of these so-called Vanderbilt lines with the State?

A. No, sir.

Q. Are not these corporations, all of them, the possessors of rolling stock of their own?

A. Yes, sir.

Q. Does not the rolling stock of these companies come into State as rolling stock of New York Central goes out of State?

A. Yes, sir; you mean in the same manner?

Q. Yes?

A. Yes.

Q. Mr. Meeder, do you know what the percentage of mileage would have been in this State if, in making the calculation which you made in exhibit for identification, you had taken as out of the State the mileage of freight cars in and out of the State of the so-called Vanderbilt line?

A. You mean——

Q. As a matter of fact, if the Vanderbilt lines located without the State had been treated as other lines without the State are treated in that computation, would not the percentage of mileage of freight cars in New York State have been very much larger?

A. If the mileage of the cars upon the Vanderbilt system, so called, were also considered as out of New York State upon Exhibit B for identification, the percentage of value of cars shown as in New York State would be much less.

Q. Now, what would be the result, taking the same basis
139 of mileage of freight cars outside of New York State?

A. That would be much greater.

Q. Now, Mr. Meeder, in arriving at that conclusion you took into consideration the cars owned by the Lake Shore, Michigan Central and other so-called Vanderbilt lines which were located without the State, did you not?

A. No, sir.

Q. Would that be true absolutely of New York Central and Hudson River Railroad Company's cars?

A. This statement covers only cars owned by New York Central and Hudson River Railroad Company, and no other.

Q. Now, then, will you state for the comptroller what the value was of the locomotives and other rolling stock of the New York Central and Hudson River Railroad Company which was continuously and exclusively without the State of New York?

Objected to by Mr. Emery, because it is incompetent, irrelevant and immaterial, and is calling for the very conclusion that the comptroller is to reach by his determination of this case upon the evidence.

Objection overruled. Exception.

A. I cannot tell from any information I have of the equipment so employed continuously and exclusively outside of the State during the year except upon an average basis.

Q. Would not the records that tell you what the wheelage was also show whether such cars were in or without the State or not?

A. As I have already stated, the car accountant's records if preserved, so far as cars are concerned, would probably show that information.

Q. Those records were in existence when you made up these tabulated statements, were they not?

A. They were, presumably.

Q. If they were not in existence how could you have made up these tabulated statements?

140 A. I am speaking now of the individual car records—records of mileage totals might be in existence whether individual car movement records were or not.

Mr. MERRILL: I think the comptroller will ask you to furnish a statement showing what cars and other rolling stock were continuously and exclusively without the State of New York during the year ending October 31st, 1900.

COUNSEL: Do you mean by that individual cars?

Mr. MERRILL: I mean that the comptroller wants an absolute statement, if it can be determined by the New York Central and Hudson River Railroad Company, as to what cars and other rolling stock it had continuously and exclusively without New York State.

Mr. KELSEY: Is it a fact that every car that the Central owns comes back?

COUNSEL: It comes back when we can get it back; to follow out each individual car would be practically a denial of justice to require any such thing.

By Mr. MERRILL:

Q. Mr. Meeder, do you know whether any of the cars are permanently and exclusively without the State?

A. I have before me a statement which shows the movement of car 14035, which went to the Lake Shore and Michigan Southern railway upon December 20th, 1901, and was continuously off the line of the New York Central until January 4th, 1903, a period of over one year.

Q. Now, Mr. Meeder, have you any way of ascertaining what portion of the rolling stock of the New York Central and Hudson River Railroad Company would be so located all that year, without

141 the State of New York, or of making a fair approximation of it?

A. The labor of following the movement of each individual car would be very great; and I may state as an indication of what that labor means, the going through the records to pick out these individual cases which were picked out at random, consumed several days of laborious tracing through all the car accountant's books.

Q. Were there any other cars picked out except those which you have presented to-day?

A. None other than those which we have here to-day; the fairest approximation I believe to be the car mileage or wheelage basis which shows actual performance of equipment.

Q. Does that show the number continuously and exclusively without the State at all or have any relation to it, Mr. Meeder?

A. These figures do not indicate individual cars, but show simply the total of miles made by the cars.

Mr. KELSEY:

Q. This computation does not take as a basis any number of specific cars that were traced and found absent for any length of time?

A. No, sir; the mileage of cars in and out of the State is arrived at in the following method: We receive from other railroads records of the number of miles made by our cars upon other lines, but they don't give us the number of individual cars. Their reports to us will simply show—Your cars made during the month so-and-so upon our line so many miles; that might be ten or it might be fifty cars. We assemble together all these miles made upon other roads, and then divide that total between the miles made by cars on other roads in New York State and on other roads out of New York State.

By Mr. MERRILL:

Q. Are those cars supposed to be in the course of returning
142 home when they are making that mileage—are they supposed to be?

A. No, sir. It is a notorious fact that many foreign roads—that is, foreign to the New York Central—would seize every available car of other lines they could get for the conduct of their own business, and in many instances that would account for equipment being off the line for any length of time. I may say in connection that the reports of mileage made by foreign roads to the New York Central, that since July 1st last this has been discontinued for what is known as the per diem system; the compensation for use of other than owned cars has been put in effect, and few roads now compute the mileage of cars other than their own.

By COUNSEL: I will now renew offer of this "Exhibit B" for identification, in the light of the cross-examination, and in support of such offer I suggest that it now appears that the evidence offered is the best evidence which the nature of the case, in any fair or reasonable view, demands.

Objected to by Mr. Merrill on the ground that it isn't the evidence to establish the facts called for by the remittitur, and that the evidence submitted in no way shows what, if any, portion of the rolling stock of the New York Central and Hudson River Railroad Company is either continuously, exclusively, or both continuously and exclusively, without the State of New York.

Objection sustained. Exception taken.

143 Report of the New York Central & Hudson River Railroad Company for the Year Ending the Thirty-first Day of October, A. D. 1900, Made Pursuant to Provisions of § 182, Chap. 908, Laws of 1896.

(Give post-office address of company, street and No.)

GRAND CENTRAL STATION, November 30, 1900.

To the comptroller of the State of New York:

Agreeably to law, as treasurer of the above company, I make the following report, viz:

1. This company began business in the State of New York in the month of November, 1869.

2. The last report made by this company to the comptroller of the State of New York under the provisions of the above act was made for the year ending October 31st, 1899.

3. Value of real estate and of interest or interests in real property in New York State, and where situated—Cannot give.

4. Organized under the laws of the State of New York.

5. Date of organization of the company—November 1, 1869.

6. Total authorized capital of company—$115,000,000.

7. Whole number of shares of stock authorized—1,150,000.

8. Number of shares of stock issued—1,150,000.

9. Par value of each share—$100.

10. Amount paid into the treasury of the company on each share—(See answers to Nos. 8 and 9).

11. *a.* Amount of capital paid in cash or property, $—.
b. Amount of capital paid in goodwill, $—.
c. Amount of capital paid in patents or copyrights, $—.
} See answers to Nos. 8 & 9.

144 12. Amount of capital upon which dividends were declared—

$100,000,000 before April 1, 1900.
$115,000,000 after " " "

13. Date of each dividend payable—Jan. 15, Ap'l 16, July 16, Oct. 16, 1900.

14. Amount of each dividend declared—
$1,250,000 Jan. and April.
$1,437,500 July and October.

15. Rate per cent. per annum of dividends—Five per cent.

16. The business transacted by this company in the State of New York for the year ending October 31st, 1900, was as follows, viz: (Give nature of business and how carried on)—Transportation.

17. And such business was carried on at the following named place or places: (Give street and number)—Very numerous places.

18. Capital stock employed in New York State—$60,370,000.

(Preceding line need not be filled out prior to March by companies whose capital is all employed —— 31, 1900, in this State.)

19. If not in New York State, where and how employed—$69,425,500 from April 1, 1900.

20. Highest price of sales of stock during the year aforesaid—139⅛.

21. Lowest price of sales of stock during the year aforesaid—120.

G. S. PRINCE, Treasurer.

STATE OF NEW YORK, }
County of New York, } ss.:

On this fifth day of December, A. D. 1900, personally appeared before me, a notary public in and for the county of New York, George S. Prince, treasurer of the above-named company, who, being duly sworn according to law, did depose and say, that the foregoing report is just, true and correct, according as the accounts stand in the books of the company, and that includes all dividends, whether cash, stock, script, or of any other character or description, declared by said company during the year ending on the thirty-first day of October, A. D. 1900.

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G. S. PRINCE, Treasurer.

Sworn to and subscribed before me, the day and year aforesaid.

J. P. McMAHON,
Notary Public (39), N. Y. Co.

Remarks.

The capital stock employed outside of New York State has been determined by taking such proportion thereof as the assets outside of the State bear to the total assets of the company in and out of New York State, viz: 39⁶³⁄₁₀₀% of $100,000,000 from Nov. 1, 1899, to March 31, 1900; and 39⁶³⁄₁₀₀% of $115,000,000 from April 1, 1900, to October 31, 1900.

Distribution of Assets, October 31st, 1900.

	In New York State.	Outside of New York State.	Total assets.
Cost of road and equipment	$166,074,130.15	$15,230,186.06	$181,304,316.21
Hudson River bridges, Albany	1,905,878.36	.....	1,905,878.36
Advances for lessor companies	5,715,997.91	944,293.07	6,660,290.98
Stocks of other companies	9,055,764.16	117,503,817.73	126,559,581.89
Bonds of other companies	4,080,411.52	.....	4,080,411.52
Cash and cash assets	8,847,030.28	10,000.00	8,857,030.28
Ownership in other lines, real estate, etc.	3,717,033.57	521,785.07	4,238,818.64
Fuel and supplies	3,992,485.63	100,000 00	4,092,485.63
Sinking fund	1,198,843.18	.....	1,198,843.18
	$204,587,574.76 (60 37/100%)	$134,310,081.93 (39 63/100%)	$338,897,656.69 (100%)

146 Lines Leased.

Beech Creek railroad.
Carthage & Adirondack Railway Company.
Carthage, Watertown & Sackets Harbor Railroad Company.
Dunkirk, Allegheny Valley & Pittsburg Railroad Company.
Fall Brook Railway Company.
Gouverneur & Oswegatchie Railroad Company.
Mohawk & Malone Railway Company.
New Jersey Junction Railroad Company.
New York & Harlem Railroad Company.
New York & Putnam Railroad Company.
Niagara Falls Branch Railroad Company.
Oswego & Rome Railroad Company.
Pine Creek Railway Company.
Rome, Waterton & Ogdensburg Railroad Company.
Spuyten Duyvil & Port Morris Railroad Company.
Syracuse, Geneva & Corning Railway Company.
Tivoli Hollow Railroad Company.
Troy & Greenbush Railroad Association.
Utica & Black River Railroad Company.
West Shore Railroad Company.

147 Exhibit A for Identification.

Exhibit A Conditionally.

Equipment, October 31st, 1900.

	In New York State.	Outside New York State.	Total.
Passenger locomotives	$1,566,072.89	$217,623.11	$1,783,796.00
Freight "	6,486,532.30	901,317.70	7,387,850.00
Passenger cars	4,643,650.64	645,245.30	5,288,895.94
Freight "	24,506,043.17	3,405,167.73	27,911,210.90
Work "	267,153.39	37,121.54	304,274.93
Passenger boats	94,845.95	13,179.05	108,025.00
Freight "	1,276,626.47	177,390.01	1,454,016.48
Cost of equipment	$38,841,024.81	$5,397,044.44	$44,238,069.25

Division of equipment based upon road mileage,		
In New York State	2,483.61	87.80%
Outside " " "	345.07	12.20%
Total road mileage	2,828.68	100%

Exhibit B for Identification.

Equipment, October 31st, 1900.

	In New York State.	Outside New York State.	Total.
Passenger locomotives	$1,783,796.00		
Freight "	7,387,850.00		
Passenger cars	5,388,895.94		
Freight cars	18,789,827.18	$9,121,383.72	
Work cars	304,274.93		
Passenger boats	108,025.00		
Freight boats	1,454,016.48		$44,238,069.25
	$35,116,685.53	$9,121,383.72	$44,238,069.25

Division of Freight Equipment Based upon Mileage of Freight Cars Outside of New York State on Roads Other Than Vanderbilt Lines Compared with Total Freight Car Mileage Both in and out of State.

Mileage of freight cars in New York State and out of State, but on Vanderbilt lines	363,563,540	67.32%
Mileage of freight cars outside New York State on roads other than Vanderbilt lines	176,511,181	32.68%
Total freight car mileage	540,074,721	100%

148 EXHIBIT 4 AND EXHIBIT C FOR IDENTIFICATION.

New York Central & Hudson River Railroad Co.

NEW YORK, Jan. 16th, 1903 ...190-.

DEAR SIR: Below please find movements of N Y C car number 41278 from C. H. EWINGS, Car Acc't.

From	Train.	Date.	Time.	To	L. or E.	Date.	Time.	Con.
N. Y. Central		4/19		Mich. Central		4/19		
Mich. Central		5/10		L. S. & M. S.		5/10		
L. S. & M. S.		6/6		Vandalia		6/6		
Vandalia		6/13		L. S. & M. S.		6/13		
L. S. & M. S.		6/24		Pere Marquette		6/24		
Pere Marquette		7/16		Mich. Central		7/16		
Mich. Central		7/18		Pere Marquette		7/18		
Pere Marquette		7/20		Mich. Central		7/20		
Mich. Central		9/21		Penn. Company		9/21		
Penn. Company		10/17		L. S. & M. S.		10/17		
L. S. & M. S.		10/31		Pitts. & Lake Erie		10/31		
P. & Lake Erie		12/8		Penn. R. R.		12/8		
Penn. R. R.		12/9		Penn. Company		12/9		
Penn. Company		12/12		Erie		12/12		
Erie		12/17		Clev., Cinn., Chic. & St. L.		12/17		

New York Central & Hudson River Railroad Co.

NEW YORK, January 16th, 1903. 190-.

DEAR SIR: Below please find movements of N Y C car number 41038 from C. H. EWINGS, Car Acc't.

From	Train.	Date.	Time.	To	L. or E.	Date.	Time.	Con.
N. Y. Central		4/28		L. S. & M. S.		4/28		
L. S. & M. S.		5/8		Lake Erie & West		5/8		
L. E. & Western		5/20		L. S. & M. S.		5/20		
L. S. & M. S.		6/2		Grand Trunk		6/2		
Grand Trunk		6/19		Mich. Central		6/19		
Mich. Central		7/26		Chic., Milw. & St. P.		7/26		
Chic., Milw. & St. P.		7/29		Mich. Central		7/29		
Mich. Central		8/26		Chic. Junction		8/26		
Chic. Junction		8/31		Mich. Central		8/31		
Mich. Central		10/10		Chic., Rock I. & Pac.		10/10		
C. R. I. & Pac.		10/14		Missouri Pac.		10/14		
Mo. Pac.		10/20		C. R. I. & Pac.		10/20		
C. R. I. & Pac.		11/27		Chicago, Peoria & West.		11/27		
Chicago, Peoria & West.		11/29		Chic., R. I. & Pac.		11/29		
C. R. I. & Pac.		12/1		Ind., Ill. & Iowa		12/1		
I. I. & Iowa		12/2		N. Y., Chic. & St. L.		12/2		
N. Y. C. & St. L.		12/5		Lehigh Valley		12/5		
Cent. of N. J.		1/2		Penn. Railroad		1/2		
Lehigh Valley		12/7		Cent. of New Jersey		12/7		
Penn. R. R.		1/9		Washington South		1/9		

149 New York Central & Hudson River Railroad Co.

NEW YORK, Jan. 16th, 1903.

DEAR SIR: Below please find movements of N Y C car number 59578 from C. H. EWINGS, Car Acc't.

From	Train.	Date.	Time.	To	L. or E.	Date.	Time.	Con.
N. Y. Central.....		4/2		L. S. & M. S		4/2		
L. S. & M. S		4/17		Lake Erie & West ..		4/17		
L. E. & Western....		5/8		Cin., Ham. & Dayton.		5/8		
Cin.,Ham. & Dayton.		5/20		L. S. & M. S.....		5/20		
L. S. & M. S.....		5/23		Mich. Central		5/23		
Mich. Central.....		6/4		Erie		6/4		
Erie		6/15		Mich. Central		6/15		
Mich. Central.....		8/20		Tor. Ham. & Buffalo.		8/20		
Tor. Ham. & Buffalo.		8/21		Mich. Central.		8/21		
Mich. Central... ...		9/15		Chic. & Alton.		9/15		
Chic. & Alton		9/30		L. S. & M. S.....		9/30		
L. S. & M. S.....		10/12		Atch., Top. & S. Fe..		10/12		
Atch., Top. & S. Fe..		10/15		Ill. Northern		10/15		
Ill. Northern		10/19		Atch., Top. & S. Fe..		10/19		
Atch., Top. & S. Fe..		10/23		L. S. & M. S		10/23		
L. S. & M. S		10/31		Del. Lack. & Western.		10/31		
Del., Lack. & Western		11/28		Mich. Central		11/28		
Mich. Central.....		12/26		L. S. & M. S		12/26		
L. S. & M. S.....		1/1		Penn. R. R.....		1/1		

New York Central & Hudson River Railroad Co.

NEW YORK, Jan. 16th, 1903.

DEAR SIR: Below please find movements of N Y C car number 63158 from C. H. EWINGS, Car Acc't.

From	Train.	Date.	Time.	To	L. or E.	Date.	Time.	Con.
N. Y. Central.....		6/12		L. S. & M. S.....		6/12		
L. S. & M. S.....		7/11		Ohio Cent. lines.....		7/11		
Ohio Cen. lines.....		7/18		L. S. & M. S		7/18		
L. S. & M. S.....		8/18		Pere Marquette.....		8/18		
Pere Marquette.....		9/8		L. S. & M. S.....		9/8		
L. S. & M. S.....		9/18		Wabash		9/18		
Wabash		9/28		L. S. & M. S....		9/28		
L. S. & M. S.....		10/2		Chic., Mil. & St. P...		10/2		
Chic., Mil. & St. P..		10/5		Union Pacific.....		10/5		
Union Pacific.....		10/11		Southern Pacific.....		10/11		

150 New York Central & Hudson River Railroad Co.

NEW YORK, Jan. 16th, 1903.

DEAR SIR: Below please find movements of N Y C car number 18236 from C. H. EWINGS, Car Acc't.

From	Train.	Date.	Time.	To	L. or E.	Date.	Time.	Con.
N. Y. Central.....		3/5		Mich. Central.		3/5		
Mich. Central.....		3/6		Pere Marquette.. ...		3/6		
Pere Marquette.....		4/2		Mich. Central.....		4/2		
Mich. Central.....		4/10		Chic., Ind. & L'ville..		4/10		
Chic., Ind. & Lou...		5/3		Elgin, Jol. & Eastern.		5/8		
Elgin, Jol. & Eastern.		5/8		L. S. & M. S.....		5/8		
L. S. & M. S..... .		5/13		Wheeling & L. Erie..		5/13		
Wheeling & L. Erie..		6/6		L. S. & M. S.....		6/6		
L. S. & M. S		6/9		Ill. Central.....		6/9		
Ill. Central.....		7/2		L. S. & M. S		7/2		
L. S. & M. S.....		8-21		Cin., Ham. & Dayton.		8/21		
Cin., Ham. & Dayton.		8/24		Louisvl. & N'shville		8/24		
Louisvl. & N'shville.		9/24		Penn. Company.....		9/24		
Penn. Company....		11/10		Lake Erie & Western.		11/10		
Lake Erie & Western.		11/25		Penn. Company.....		11/25		
Penn. Company.....		12/20		Clev., Cinn., Chic., & St. L.		12/20		

New York Central & Hudson River Railroad Co.

NEW YORK, Jan. 16th, 1903.

DEAR SIR: Below please find movements of N Y C car number 63123 from C. H. EWINGS, Car Acc't.

From	Train.	Date.	Time.	To	L. or E.	Date.	Time.	Con.
N. Y. Central		6/15		L. S. & M. S.		6/15		
L. S. & M. S.		6/18		Penn. Railroad		6/18		
Penn. Railroad		6/22		L. S. & M. S.		6/22		
L. S. & M. S.		6/25		Baltimore & Ohio		6/25		
Baltimore & Ohio		7/17		L. S. & M. S.		7/17		
L. S. & M. S.		8/1		Penn. Company		8/1		
Penn. Company		8/6		L. S. & M. S.		8/6		
L. S. & M. S.		8/14		Wheeling & L. E.		8/14		
Wheeling & Lake E.		9/5		Mich. Central		9/5		
Mich. Central		9/19		Wis. Central		9/19		
Wis. Central		9/21		Mich. Central		9/21		
Mich. Central		9/26		Chic. Ter. & Trans.		9/26		
Chic. Ter. & Trans.		10/7		Chicago Be[illegible]		10/7		
Chic. Belt		10/8		N. Y., Chic. & St. L.		10/8		
N. Y., Chic. & St. L.		10/10		L. S. & M. S.		10/10		
L. S. & M. S.		11/[illegible]		Chic., Bur. & Quin.		11/5		
Chic., Bur. & Quin.		11/[illegible]		[illegible]		11/20		
Chic. Belt		11/[illegible]		Mich. Central		11/20		
Mich. Central		12/8		Detroit, Tol. & Mil.		12/8		
Detroit, Tol. & Mil.		12/[illegible]		Penn. Company		12/21		

151 New York Central & Hudson River Railroad Co.

NEW YORK, Jan. 16th, 1903.

DEAR SIR: Below please find movements of N Y C car number 63176 from C. H. EWINGS, Car Acc't.

From	Train.	Date.	Time.	To	L. or E.	Date.	Time.	Con.
N. Y. Central		2/11		L. S. & M. S.		2/11		
L. S. & M. S.		2/14		C., C., C. & St. L.		2/14		
C., C., C. & St. L.		2/17		Ohio Central lines		2/17		
Ohio Central lines		2/22		Chesapeake & Ohio		2/22		
Chesap. & Ohio		3/27		C., C., C. & St. L.		3/27		
C., C., C. & St. L.		3/29		Ill. Central		3/29		
Ill. Central		4/11		Chic. Ter. & Trans.		4/11		
Chic. Ter. & Trans.		4/12		Chic. Belt		4/12		
Chic. Belt		4/30		L. S. & M. S.		4/30		
L. S. & M. S.		5/16		Chic. Junction		5/16		
Chic. Junction		5/20		L. S. & M. S.		5/20		
L. S. & M. S.		5/24		Lehigh Valley		5/24		
Lehigh Valley		5/28		N. Y., N. H. & H.		5/28		
N. Y., N. H. & H.		5/29		Boston & Maine		5/29		
Boston & Maine		6/21		N. Y., N. H. & H.		6/21		
N. Y., N. H. & H.		7/6		Lehigh Valley		7/6		
Lehigh Valley		7/7		Ironton R. R.		7/7		
Ironton R. R.		7/8		Lehigh Valley		7/8		
Lehigh Valley		7/11		Mich. Central		7/11		
Mich. Central		9/12		Lehigh Valley		9/12		
Lehigh Valley		9/21		Norfolk & Western		9/21		
Norfolk & Western		10/31		C., C., C. & St. L.		10/31		
C., C., C. & St. L.		11/2		Grand Rap. & Ind.		11/2		
Grand Rap. & Ind.		11/15		Dul., S. Shore & Atl.		11/15		
Dul., S. Shore & Atl.		11/17		M., St. P. & S. Ste. M.		11/17		
M., St. P. & S. Ste. M.		11/20		Dul., S. Shore & Atl.		11/20		
Dul., S. Shore & Atl.		12/3		Grand Rap. & Ind.		12/3		
Grand Rap. & Ind.		12/18		Penn. Company		12/18		

152 New York Central & Hudson River Railroad Co.

NEW YORK, January 6th, '03.

DEAR SIR: Below please find movements of N Y C car number 64431 from
C. H. EWINGS, Car Acc't.

From	Train.	Date.	Time.	To	L. or E.	Date.	Time.	Con.
N. Y. Central		6/27		L. S. & M. S		6/27		
L. S. & M. S		7/8		Chic., Ind. & Louis.		7/8		
Chic., Ind. & Louis.		7/14		Mich. Central		7/14		
Mich. Central		7/30		Det., Tol. & Mil		7/30		
Det., Tol. & Mil		8/5		L. S. & M. S		8/5		
L. S. & M. S		8/18		Penn. R. R		8/18		
Penn. R. R		9/7		N. Y., N. H. & H		9/7		
N. Y., N. H. & H		9/9		Boston & Maine		9/9		
Bost. & Maine		9/17		N. Y., N. H. & H		9/17		
N. Y., N. H. & H		9/19		Bost. & Maine		9/19		
Bost. & Maine		9/24		N. Y., N. H. & H		9/24		
N. Y., N. H. & H		10/4		Penn. R. R		10/4		
Penn. R. R		10/22		Penn. Co		10/22		

New York Central & Hudson River Railroad Co.

NEW YORK, February 9, 1903.

DEAR SIR: Below please find movements of N Y C car number 61834 from
C. H. EWINGS, Car Acc't.

Movements.	Date. Month.	Day.	Year.	L. or E.	Time.	Train.	Co
Rec'd from							
From N. Y. C.							
To L. S. & M. S	July	2	1902		M		
From "							
To Elgin, Joliet & Eastern	"	6	"		M		
From " " "							
To Chicago & No. Western	"	8	"		M		
From " " "							
To Union Pacific	"	10	"		M		
From " "							
To Southern Pacific	"	14	"		M		
From " "							
To Union Pacific	Aug.	8	"		M		
From " "							
To Southern Pacific	"	11	"		M		
Del'd to " "							
Rec'd to " "							
From Southern Pacific							
To Atch., Topeka & Santa Fe Coast Line	Dec.	17	"		M		
From " " "							
To Southern Pacific	"	18	"		M		

Louis R. R., Pittsburg and Lake Erie railroad, and such lines as are controlled through ownership by those that I have mentioned.

By COUNSEL: Now, I offer this in evidence for the purpose of going further than the remittitur would require, to wit, showing the proportion of this equipment continuously employed outside of the State, but further restricting it to such; the dividing between the equipment on the one hand used within the State or on the New York Central operated lines, whether in or out of the State or upon the Vanderbilt lines as the witness has just designated without, and upon the other hand the continuous employment and use of it upon lines entirely foreign to the New York Central Company. The last figures show the amount and proportion entirely off all these lines that I have named, as well as entirely outside of the State.

By Mr. MERRILL:

Q. Mr. Meeder, are you prepared to swear that any car or percentage of the cars and locomotives mentioned in that statement were continuously and also exclusively used without New York State?

A. No, sir, I am not prepared to swear to the number so employed, but, so far as locomotives are concerned, I think comparatively few were so employed without the State.

Q. Now, Mr. Meeder, the remittitur calls for two concurrent conditions—one that this rolling stock shall be continuously employed without the State and the other is that it shall be exclusively
133 employed without the State owned by this corporation, and I say it is incumbent upon this corporation to show to the comptroller how much, if any, of that rolling stock is not only continuously but exclusively employed without the State, and that no other evidence is competent.

Same excluded; exception taken.

By COUNSEL: I have here a list of number of car movements, as they are termed—that is, a showing of the individual cars by their number as they pass back and forth from one company to another, which I desire to have identified.

Objected to by Mr. Merrill, on the ground that it is incompetent, immaterial and irrelevant; that it doesn't show that those cars were exclusively and continuously employed without the State. Received as Exhibit C for identification.

By COUNSEL:

Q. Examine the paper marked Exhibit C for identification, Mr. Meeder, and state whether it was prepared under your direction and supervision?

A. Yes, sir, it was so prepared.

Q. And what have you to say as to its being correctly transcribed from the records of the movements of the cars?

A. I believe it to be a correct transcript from the records.

Q. What it means is that freight car number 27941 passed from

the possession of one railroad company to another railroad and at the dates named and at the dates specified in the statement?

A. Yes, sir.

Same offered in evidence. I offer to show by this that car number 27941 went from the New York Central and Hudson River railroad to the Michigan Central railroad on June 12th, 1902;

134 that it passed from the possession of the Michigan Central railroad to the Chicago, Rock Island and Pacific railroad on June 14th, 1902, and from that date on passed from hand to hand from one company to another at the dates shown until November 25th, 1902, when it was still in the hands of the Chicago, Rock Island and Pacific, during which, more than five months, it was never in the possession of the New York Central and Hudson River Railroad Company or of any of the so-called Vanderbilt or New York Central lines.

Mr. MERRILL: We object to it on the ground that it does not satisfy the two concurrent conditions laid down in the remittitur, and furthermore that the whole transaction transpired after the close of the taxing year ending October 31st, 1900.

Same excluded.

By COUNSEL:

Q. Having in mind, Mr. Meeder, the history of the movement of car number 27941, as shown in the Exhibit C for identification, to which your attention has been called, what have you to say as to whether that is or is not fairly illustrative of the movement of vast numbers of the freight cars of the New York Central and Hudson River Railroad Company during the year ending October 31st, 1900, as regards their movement on other than so-called Vanderbilt lines?

A. I believe that this illustration of the movement of car 27941, while showing dates subsequent to October 31st, 1900, is an illustration of what did occur within the year ending October 31st, 1900, as regards numerous individual cars belonging to the New York Central and Hudson River Railroad Company; that is to say, that

135 the records of the car accountant would show the delivery of New York Central and Hudson River Railroad Company's cars to other lines outside of New York State, and that they were not returned to the line of the New York Central for a considerable period of time.

Q. And what have you to say, Mr. Meeder, as to whether or not the mileage of freight cars outside New York State on roads other than Vanderbilt lines, 176,511,181, and the per centum, 32.68, is based essentially and largely upon car movements within that year, of which those shown upon Exhibit C for identification is illustrative?

A. To the best of my knowledge and belief, this total is mainly made up of individual car movements, such as illustrated in the table for number 27941.

153 New York Central & Hudson River Railroad Co.

NEW YORK, February 9, 1903.

DEAR SIR: Below please find movements of N Y C car number 14035 from
C. H. EWINGS, Car Acc't.

Movements.	Date. Month.	Day.	Year.	L. or E.	Time.	Train.	Con.
Rec'd from					M		
N. Y. C.					M		
To L. S. & M. S.....	Dec.	20	1901		M		
From " "					M		
To Cleve., Cin. Chic. & St. L.	"	23	"		M		
From " " "					M		
To Norfolk & Western.....	"	28	"		M		
From " "					M		
To Cleve. Cin. Chic. & St. L.	Jan.	8	1902		M		
From " " " .					M		
To Norfolk & Western.....	"	12	"		M		
From " "					M		
To Chesapeake & Ohio....	"	14	"		M		
From " "					M		
To Southern.....	"	20	"		M		
Del'd to					M		
Rec'd from					M		
From Southern					M		
To Washington Southern..	Feb.	20	"		M		
From " " ..					M		
To Southern.....	Mar.	15	"		M		
From "					M		
To Baltimore & Ohio.....	"	24	"		M		
From " "					M		
To Southern	Apr.	21	"		M		
From "					M		
To Baltimore & Ohio.....	July	9	"		M		
From " "					M		
To Southern	"	11	"		M		
From "					M		
To Washington Southern..	Sept.	3	"		M		
Del'd to							
Rec'd from					M		
From Wash. Southern.....					M		
To Southern.....	Oct.	26	"		M		
From "					M		
To Chesapeake & Ohio....	Nov.	7	"		M		
From " "					M		
To Penn. R. R.....	Dec.	3	"		M		
From "					M		
To Chesapeake & Ohio....	Jan.	4	1903		M		
From " "					M		
To					M		
From.....					M		
To					M		
From.....					M		
To					M		
Del'd to							

154 New York Central & Hudson River Railroad Co.

NEW YORK, February 9, 1903.

DEAR SIR: Below please find movements of N Y C car number 27941 from
C. H. EWINGS, Car Acc't.

Movements.	Date. Month.	Day.	Year.	L. or E.	Time.	Train.	Con.
Rec'd from					M		
From N. Y. C.					M		
To Mich. Central	June	12	1902		M		
From "					M		
To Chic. R. Island & Pac.	"	14	"		M		
From " "					M		
To Colo. Midland	"	18	"		M		
From " "					M		
To Rio Grande Western	"	20	"		M		
From " "					M		
To Southern Pacific	"	21	"		M		
From " "					M		
To Union Pacific	Aug.	8	"		M		
From " "					M		
To Southern Pacific	Sept.	16	"		M		
Del'd to							
Rec'd from					M		
From Southern Pacific					M		
To Union Pacific	Sept.	22	1902		M		
From " "					M		
To Rio Grande Western	"	23	"		M		
From " "					M		
To Colo. Midland	Oct.	7	"		M		
From " "					M		
To Denver & Rio Grande	"	31	"		M		
From " " "					M		
To Colo. Midland	Nov.	5	"		M		
From " "					M		
To Chic., R. Island & Pac.	"	25	"		M		
From " " "					M		
To					M		
Del'd to							

155 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of The New York Central and Hudson River Railroad Company, Relator,

against

NATHAN L. MILLER, as Comptroller of the State of New York, Respondent.

Stipulation under Sections 3301 and 1353 of the Code of Civil Procedure.

It is hereby stipulated, under section 3301 of the Code of Civil Procedure, that the foregoing are true copies of the petition for writ of certiorari, order of issuance of writ, writ, and return to writ and

certification thereof, as required by section 1353 of the Codes of Civil Procedure, is hereby waived.

Dated New York, July 22, 1903.

IRA A. PLACE,
Attorney for Relator.
JOHN CUNNEEN,
Attorney General, Attorney for Respondent.

156 Order of Appellate Division.

At a term of the appellate division of the supreme court of the State of New York, held in and for the third judicial department of said State, at the appellate division court room, in the city of Albany, commencing on the 10th day of November, 1903.

Present: Hon. Charles E. Parker, presiding justice. Walter Lloyd Smith, Emory A. Chase, Alden Chester, James H. Houghton, associate justices.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of the New York Central and Hudson River Railroad Company, Relator,

vs.

NATHAN L. MILLER, as Comptroller of the State of New York, Defendant.

This cause having been brought on for argument and having been heard upon the writ of certiorari and return and the papers upon which the writ was granted and having been argued by Ira A. Place, Esq., of counsel for the relator, by William H. Wood, Esq., deputy attorney general, of counsel for the defendant,

Now, on motion of John Cunneen, attorney general, attorney for the defendant,

157 It is ordered, that the determination of the comptroller be and the same hereby is unanimously confirmed, with fifty dollars costs and disbursements.

[L. S.] JOSEPH H. HOLLANDS, Clerk.

(A copy.)

JOSEPH H. HOLLANDS, Clerk.

Opinion of Appellate Division.

Argued at November Term, 1903; Decided at November Term, 1903.

Appellate Division, Third Department.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* The New York Central and Hudson River Railroad Company, Relator,
vs.
NATHAN L. MILLER, as Comptroller of the State of New York, Respondent.
} Opinion for Affirmance.

Writ of certiorari issued June 13, 1903, to review the determination of the comptroller made April 23, 1903, on remittitur from the court of appeals to him for determination as to whether any
158 portion of the relator's rolling stock was exempt from the annual franchise tax imposed for the year ending October 31, 1900.

Ira A. Place, for relator.

John Cunneen, attorney-general (William H. Wood, of counsel), for respondent.

HOUGHTON, J.:

The original determination of the comptroller imposing the franchise tax under section 182 of the tax law, upon the relator for the year ending October 31, 1900, was reviewed by this court and a readjustment ordered. (People *ex rel.* N. Y. C. & H. R. R. Co. *vs.* Knight, 75 App. Div., 169.) On that readjustment it was held that the relator was entitled to be credited on the value of its rolling stock with the sum of $15,230,186.06, which was the proportionate value of the average amount of its rolling stock employed outside the State during the year.

Upon a review of our decision by the court of appeals, that court decided that the relator could not be credited with this average amount of its rolling stock employed outside the State during the year, but only such of it as was used exclusively and continuously outside, and remitted the proceeding to the comptroller for further hearing upon that subject. (People *ex rel.* N. Y. C. & H. R. R. Co. *vs.* Knight, 173 N. Y., 255.)

That hearing has been had and the comptroller has found that none of the rolling stock was used continuously and exclusively throughout the year outside the State of New York, and has deducted nothing for the value of cars and equipment temporarily or on an average employed outside.

The relator insists that the comptroller has misapprehended the

decision of the court of appeals. We do not think so. The
159 decision is very [illegible]. There are two opinions, one discussing all the questions and upholding the credit directed to be given for the value of the average amount of cars employed by the relator outside the State during the year. The majority of the court, however, refused to concur in the propriety of this credit, and the matter was, therefore, remitted to the comptroller for further proof upon the subject of continuous and exclusive employment by the relator of rolling stock outside the State.

The relator failed to establish upon such hearing that it employed any of its rolling stock in this manner, and the comptroller has properly found that none was so employed, and it remains only for us to confirm his determination.

It would be neither profitable nor proper for us to enter upon a discussion of a question so pointedly decided, or even to point out the logical effect of the application of the rule to the imposition of the franchise tax upon foreign corporations employing in a similar manner a portion of their capital within the State.

The determination of the comptroller must be confirmed, with costs.

160 Relator's Notice of Appeal to Court of Appeals.

Supreme Court, County of Albany.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of The New York Central and Hudson River Railroad Company, Relator, *against* NATHAN L. MILLER, as Comptroller of the State of New York, Respondent.	Notice of Appeal to Court of Appeals. Proceeding for 1900.

SIRS: Please take notice that the relator in the above-entitled action hereby appeals to the court of appeals from the order of the appellate division of the supreme court, third department, entered herein in the office of the clerk of the county of Albany, on the 10th day of December, 1903, and from each and every part of said order.

Dated New York, December 14, 1903.

Yours, &c.,
IRA A. PLACE,
Attorney for Relator, Room 417, Grand Central Station,
Borough of Manhattan, New York City, N. Y.

To John Cunneen, Esq., attorney for respondent, capitol, Albany, N. Y., and clerk of the county of Albany, Albany, N. Y.

161 Stipulation.

In the Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of The New York Central and Hudson River Railroad Company, Appellant, *against* NATHAN L. MILLER, as Comptroller of the State of New York, Respondent.	Stipulation under Sections 3301 and 1353 of the Code of Civil Procedure. Proceedings for 1900.

It is hereby stipulated, under section 3301 of the Code of Civil Procedure, that the foregoing are true copies of the notice of appeal, the order appealed from and the papers upon which the court below acted in making said order, on file in the office of the clerk of Albany county, and certification thereof, as required by section 1353 of the Code of Civil Procedure, is hereby waived.

Dated borough of Manhattan, New York city, December 21, 1903.

IRA A. PLACE,
Attorney for Appellant.
JOHN CUNNEEN,
Attorney General, Attorney for Respondent.

162 Court of Appeals.

STATE OF NEW YORK, *ss.*:

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 23rd day of February, in the year of our Lord one thousand nine hundred and four, before the judges of said court.

Witness, the Hon. Alton B. Parker, chief judge presiding.

W. H. SHANKLAND, Clerk.

Remittitur, February 24th, 1904.

Albany Special Term, M'ch 12, 1904.

Read on motion and ordered filed in Albany county clerk's office.

JOHN FRANEY, Clerk.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* The New York Central and Hudson River Railroad Company, Appellant, *ag'st* NATHAN L. MILLER, as Comptroller, etc., Respondent.	Proceeding for 1900.

Be it remembered, that on the 28th day of December in the year of our Lord one thousand nine hundred and three The New York

Central and Hudson River Railroad Company the appellant in this proceeding came here into the court of appeals, by Ira A. Place, its attorney, and filed in the said court a notice of appeal and re-
163 turn thereto from the order of the appellate division of the supreme court in and for the third judicial department. And Nathan L. Miller, as comptroller etc. the respondent in said proceeding, afterwards appeared in said court of appeals by John Cunneen, attorney general, his attorney. Which said notice of appeal and the return thereto filed as aforesaid, are hereunto annexed.

Whereupon, the said court of appeals having heard this cause argued by Mr. Ira A. Place of counsel for the appellant, and by Mr. John Cunneen of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the appellate division of the supreme court appealed from herein be, and the same hereby is affirmed with costs relator having contended herein that if the statute purported to authorize the tax here in question said statute was violative of the Constitution of the United States in the particular following. The court hold and adjudge that the statute (1) does not offend against the commerce clause (article 1 of section 8) of the Federal Constitution (2) does not contravene the provisions of article 1 section 10 thereof forbidding impairment of the obligations of contracts (3) does not offend against the provision of the fourteenth amendment thereof forbidding the State to deprive any person of property without due process of law.

And it was also further ordered, that the record aforesaid, and the proceedings in this court, be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, with costs etc. etc. as aforesaid.

And hereupon, as well the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by
164 them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, February 24th, 1904.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[SEAL.] W. H. SHANKLAND, Clerk.

STATE OF NEW YORK, }
County of Albany, Clerk's Office, } ss:

I, John Franey, clerk of the said county, and also clerk of the supreme and county courts, being courts of record held therein, do hereby certify that I have compared the annexed copy remittitur the original thereof, filed in this office on the 16th day of March, 1904, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 11th day of May, 1904.

[SEAL.] JOHN FRANEY, Clerk.

165 In the Court of Appeals of the State of New York.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* The New York Central and Hudson River Railroad Company, Appellant, *v.* NATHAN L. MILLER, as Comptroller of the State of New York, Respondent. } Actions 1 and 2.

People *ex rel.* N. Y. C. & H. R. R. R. Co. *v.* Miller, 89 App. Div. 127, affirmed.

(Argued February 9, 1904; decided February 23, 1904.)

Appeals from orders of the appellate division of the supreme court in the third judicial department, entered December 10, 1903, which affirmed determinations of the defendant in imposing a tax upon the relator for the years 1900 and 1901 under section 182 of the tax law.

Ira A. Place and Thomas Emery for appellant.

John Cunneen, attorney-general (William H. Wood on the brief), for respondent.

Orders affirmed, with costs, on opinion in People *ex rel.* N. Y. C. & H. R. R. R. Co. *v.* Knight (173 N. Y. 255).

Concur: Parker, Ch. J., Haight, Martin, Vann and Cullen, JJ. Not sitting: Gray, J. Not voting: O'Brien, J.

166 [Endorsed:] In the court of appeals of the State of New York. The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, appellant, *v.* Nathan L. Miller, as comptroller of the State of New York, respondent. Memoranda opinion. Tax of 1900.

167 At a special term of the supreme court of the State of New York held in and for the county of Albany at the city hall in said city, on the 12th day of March, 1904.

Present: Hon. D. Cady Herrick, justice.

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* NEW YORK Central & Hudson River Railroad Company
vs.
NATHAN L. MILLER, as Comptroller of the State of New York.

The above entitled cause having been taken to the court of appeals from an order of the appellate division of the supreme court, in the third department, entered and filed in the office of the clerk of said appellate division in the city of Albany, N. Y. on December 10, 1903, which order affirmed the determination of the comptroller in auditing and stating the account of the relator for the State franchise tax, based on the value of the capital stock of the relator employed in this State for the year ending October 31, 1900, amounting to $159,000, and adjudged that the defendant recover against the relator the sum of fifty dollars costs and disbursements, and said appeal having been taken from every part of said order and the said court of appeals having rendered judgment in the cause on the 23d day of February, 1904, in all things affirming the judgment of said appellate division further ordering that the record of said
168 cause and that the proceedings in the court of appeals be remitted to the supreme court, to be enforced according to law and also further ordering that the defendant recover of the relator The New York Central & Hudson River Railroad Company, the costs of appeal to said court of appeals, now therefore, on reading and filing the said remittitur, and on motion of John Cunneen, attorney general, attorney for the defendant,

It is ordered and adjudged that the judgment of the court of appeals be and the same hereby is made the judgment of this court, and that the defendant recover of the said relator, The New York Central & Hudson River Railroad Company, the costs and disbursements of this proceeding, to be taxed by the clerk.

D. CADY HERRICK,
Jus. Sup. Ct.

169 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* NEW YORK Central & Hudson River Railroad Company
vs.
NATHAN L. MILLER, as Comptroller of the State of New York.

An order in this action having been made by the appellate division of the supreme court, third department, which order was entered in the office of the clerk of said appellate division in the city of Albany on December 10, 1903, affirming the determination of the

comptroller in auditing and stating the account of the relator for the State franchise tax for the year ending October 31, 1900, at the sum of $159,000, and adjudging that the defendant recover of the relator the sum of fifty dollars costs and disbursements, and an appeal having been taken by the relator from said order to the court of appeals and the said court of appeals having rendered judgment in this cause on the 23d day of February, 1904, in all things affirming the order of said appellate division, and further ordering that the defendant recover from the relator the costs of appeal to said court of appeals, and further ordering that the record in said cause and proceeding in said court of appeals be remitted to the supreme court to be enforced according to law, and the said court of appeals having ordered to be sent to this court its remittitur, by which it appears that the said court of appeals has affirmed said judgment of the appellate division in all things, with costs,
170 and has given judgment accordingly, and this court having by order entered herein on the 16th day of March, 1904, ordered that the said judgment of the court of appeals be made the judgment of this court, with costs and disbursements,

Now therefore, on motion of John Cunneen, attorney general, attorney for defendant,

It is adjudged that the judgment of said court of appeals be and the same hereby is made the judgment of this court, and that the defendant have execution against the relator The New York Central & Hudson River Railroad Company for the sum of $151.70, costs and disbursements.

JOHN FRANEY, Clerk.

171 [Endorsed:] New York supreme court. The People of the State of New York, upon the relation of the New York Central and Hudson River Railroad Company, against Nathan L. Miller, as comptroller of the State of New York. Order and judgment. Tax of 1900.

172 Petition for Writ of Error to the Supreme Court of the State of New York.

In the Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of the New York Central and Hudson River Railroad Company, Plaintiffs in Error,

against

NATHAN L. MILLER, as Comptroller of the State of New York, Defendant in Error.

To the honorable justices of the Supreme Court of the United States:

Come now the said petitioners The People of the State of New York upon the relation of the New York Central and Hudson River

Railroad Company by their attorney, and as and by way of complaint of and against the said Nathan L. Miller, as comptroller of the State of New York, respondent, respectfully show to the court:

That the said relator, The New York Central and Hudson River Railroad Company, was during all of the times mentioned in the record herein and is a domestic corporation of the State of New York, organized under the laws of and domiciled within that State, engaged in the business of a common carrier of persons and property between points respectively within that State, and between points respectively within the respective States of New Jersey and Pennsylvania, and between points in either of the said re-

173 spective States and points in either of the others thereof, and between points in either of said States and points in other States and foreign countries, and between points in respective States other than the above, via and over routes extending through and over portions of one or more of the said respectively named States.

That by provision of the tax law of the State of New York, section 180, the tax or license fee of and for domestic corporation organization and existence is imposed, exacted and paid once for all at the threshold of the vesting of corporate power; section 182 thereof provides imposition of an annual franchise tax for and upon the exercise of domestic corporation franchises to be computed as therein provided upon the basis of the amount of corporate capital employed in said State within the tax year; and, section 184 thereof provides imposition of an additional annual franchise tax to be computed upon the basis of the amount of corporate gross earnings within the tax year.

That during the year ending October 31, 1900, for and in respect of which the tax here in question was imposed and exacted, the said relator carried on its said business of a common carrier of persons and property in and by the operation of engines, cars and trains upon and over its owned and leased lines of railroad and lines of railroad upon and over which it had trackage rights, respectively, within the State of New York, and upon and over leased lines of railroad and lines of railroad upon and over which it had trackage rights, respectively, within the respective States of New Jersey and Pennsylvania, upon all whereof it carried persons and property locally between points within the respective States wherein portions of its operated lines of railroad were situate, and between points in those respective States and points in other States.

174 That in and about the carrying on of said transportation business by the said relator large numbers of its cars, though composed of frequently and constantly changing individual cars, passed into or out of the said respective States of New York, New Jersey and Pennsylvania in such wise that at all times a large average number, to wit, many hundreds of the cars of said relator were continuously situate, employed and operated in the States of New Jersey and Pennsylvania, respectively, upon and over railroads there situate, and in so doing were thus operated in the right of and under

authority of the franchises in that behalf granted by those respective States and subject unto the burdens imposed and regulations prescribed in and by the laws, rules and ordinances of the respective States, and political subdivisions thereof, wherein the said portion of road was situate and the said transportation service performed.

That the major part of the said relator's said transportation business consisted of such transportation by it upon and over portions of its said operated lines of road of so much of through carriage of persons and property starting or consigned from points outside of the respective States of New York, New Jersey and Pennsylvania and destined to points within said respective States, or *vice versa*, and persons and property starting or consigned from points respectively without either of said States, passing en route through some one or more thereof, and destined to points respectively without either thereof.

That inasmuch as the said transportation service thus performed and rendered by the said relator consisted of operations within the said States of New Jersey and Pennsylvania respectively, they consisted of and inhered in the exercise of franchises granted by
175 those States respectively to corporations created by and domiciled within the said States, respectively, which were thus exercised by relator under and in pursuance of contracts of and for leases of, and contracts of and for trackage rights upon and over, railroads there situate, together with the franchise to maintain and operate the same, granted, remised and accorded by the said corporations created by said respective States to the said relator, and exercised and enjoyed by the said relator in and under authority of the rights of its respective lessors and under and in pursuance of and subject unto the burdens imposed and regulations prescribed by the said States of New Jersey and Pennsylvania respectively.

That in and by the exercise and performance of the functions thus employed by the said relator in the respective States of New Jersey and Pennsylvania the only such function which it thus exercised under authority of the State of New York was that of its corporate existence, the tax whereon or wherefor is no part of the tax here in question.

That the said franchises thus exercised by the said relator in the respective States of New Jersey and Pennsylvania in and about and in respect of the there operation of its trains and transportation of persons and property were solely those granted and accorded by and under authority of the said respective States wherein the said operations were carried on and conducted, and were altogether and only subject unto regulations prescribed and promulgated by authority of those respective States and by authority of the United States, and not at all by authority of the State of New York.

176 That if and so far as it was within the province and power of the State, as distinguished from the United States, to impose or exact burdens upon or to prescribe regulations for and concerning the exercise by relator of the said franchises of railroad

maintenance, train operation and transportation of persons and property, the province and power thereof solely inhered in and pertained to the said respective State of New Jersey or Pennsylvania wherein the said respective railroad was situate and the said franchises were exercised, and not in or to the said State of New York.

That in and about the said relator's train operations and transportation of persons and property upon and over its said operated lines of railroad in the said respective States of New York, New Jersey and Pennsylvania, respectively, in obedience to the requirements of the laws of the United States respecting through transportation from one State to another of carload commodities without reloading or breaking of bulk, and otherwise in conformity with the methods generally observed and followed by common carrier railroad transportation companies within the United States, in the time last preceding and within the said tax year, large numbers of relator's cars of various kinds were from day to day transferred and delivered from relator, and its said operated lines of railroad, in the respective States of New York, New Jersey and Pennsylvania, to, and upon the railroads of and operated by, other common carrier railroad transportation companies foreign to and outside of the State of New York, whereby a large average number of relator's cars, consisting of more or less frequently changing individual cars, were continuously and at any and all times out of the State of New York, and out of the
177 possession, custody and use of the said relator, and in the meantime transferred and delivered, more or less frequently from one to another common carrier railroad transportation corporation, and by them employed outside of the State of New York in and about their mutual and respective transportation business, foreign to and entirely dissociated from the business of the said relator, and in such wise as rendered it impossible for the said relator to know, be informed or make proof, what, if any, of the said cars, and the extent to which all or any thereof, were employed in transportation business solely within or domestic to any State, or in transportation business between or among the several States, or between the United States and countries or dominions foreign thereto.

That the capital of the said relator invested and employed in the average number of the cars of the relator in manner aforesaid absent from and employed outside of the State of New York in and during the franchise tax year ending October 31, 1900, was in excess of the sum of $13,405,619.36, which said sum stood in such relation to the meantime total capital of said relator that in and by inclusion thereof as subject unto the franchise tax to be computed upon the basis of relator's capital employed within the State of New York, the said franchise tax was augmented and enlarged in and by the sum of $8,404.54.

That the said comptroller of the State of New York in and about the imposition and laying of the said franchise tax upon and against the said relator to be computed upon the basis of the capital of the said relator employed within the State of New York during the said

tax year, and the said respective courts in and about their respective final orders and judgments of affirmance of the said tax, imposed and sustained the same computed upon the basis of and in-
178 cluding all of the cars of the said relator, the large average numbers whereof were in manner aforesaid absent from and employed in State and interstate and foreign commerce outside of the State of New York.

And the said petitioners further respectfully show unto the court and complain that in the said record and proceedings had in the above entitled action, (taxes of A. D. 1900), and also in the rendition of the final order and judgment in the said cause, in the supreme court of the State of New York, sitting in Albany county, third judicial department, at the appellate division November term thereof, A. D. 1903, to wit: November 10, 1903, as also in the final order and judgment of the court of appeals of the State of New York, to which last mentioned court the said cause was appealed by said petitioners, being the highest court of law and equity in said State, and the highest such court in which a decision could be had in said cause, to wit: on February 23, A. D. 1904, affirming on appeal the said final order and judgment of the supreme court of the State of New York, in the said cause between the said The People of the State of New York upon the relation of The New York Central and Hudson River Railroad Company, petitioners and plaintiffs in error, and the said Nathan L. Miller, as comptroller of the State of New York, respondent, and defendant in error, in each which supreme court and court of appeals, was drawn in question the validity of a statute of said State, and the validity of an authority exercised by the said comptroller under said State, on the grounds that (1) they constituted a burden upon and regulation of commerce among the several States as carried on and conducted by the said relator and were thus repugnant to the commerce clause article 1, section 8, of the Constitution of the United States: (2) they impair the
179 obligations of contracts of and with the said relator and were thus repugnant to article 1, section 10 of the Constitution of the United States; and (3) they deprive the said relator of its property and property rights without due process of law and were thus repugnant to the provisions of the fourteenth amendment of the Constitution of the United States; and the decision, final order and judgment of each thereof, the said supreme court and the said court of appeals, was in favor of such their validity; and that in and by and in pursuance of the said decision, final order and judgment of affirmance and order of mandate and remittitur of the said court of appeals of the State of New York, the record and proceedings in said cause were remitted to and now remain in the said supreme court of the State of New York before the justices thereof; and in pursuance thereof and of the statutes of the State of New York in such case made and provided, thereafter, to wit; on March 16, 1904, final order and judgment was rendered by and entered in the supreme court, in said cause, in obedience to and in conformity with the said

decision, order, judgment and remittitur of the said court of appeals; in all whereof manifest error hath happened to the prejudice and damage of the said relator, The New York Central and Hudson River Railroad Company.

Wherefore, the said The People of the State of New York upon the relation of The New York Central and Hudson River Railroad Company, petitioners and plaintiffs in error, pray for the allowance of a writ of error, and for such other and further orders and process as may cause the record and proceedings aforesaid, with all things concerning the same, to be sent to the Supreme Court of the
180 United States, that upon final hearing hereof the said error be corrected, and such other and further proceeding be ordered and had as according to law should be done.

And your petitioners will ever pray.

Dated, July 25th, 1904.

IRA A. PLACE,

Attorney for Petitioners, Plaintiffs in Error, Room 417 Grand Central Station, Borough of Manhattan, New York City, N. Y.

THOMAS EMERY, Of Counsel.

STATE OF NEW YORK, County of New York, } ss.:

Edward L. Rossiter, being duly sworn, says, that he is an officer of The New York Central and Hudson River Railroad Company, the petitioner herein, to wit, the treasurer thereof; that the foregoing petition is true to the best of his knowledge and belief.

E. L. ROSSITER.

Sworn to before me this 25th day of July, 1904.

JOHN A. MATTISON,
Notary Public, New York County.

Allowed this — day of July, 1904.

——— ———,
Chief Judge of the Court of Appeals of the State of New York.

181 [Endorsed:] United States Supreme Court. The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, plaintiffs in error, against Nathan L. Miller, as comptroller of the State of New York, defendant in error. Petition for writ of error. Tax of 1900. Ira A. Place, attorney for plaintiffs in error, Grand Central station, borough of Manhattan, New York city, N. Y. To John Cunneen, Esq. att'y for def't in error Service of a copy of the within petition is hereby admitted this 3 day of Aug. 1904 John Cunneen att'y gen'l att'y for def't in error S. T. C

182 Copy.

United States Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* THE NEW York Central and Hudson River Railroad Company, Appellant.
against
NATHAN L. MILLER, as Comptroller, etc., Respondent.

Know all men by these presents, that we, The People of the State of New York *ex rel.* The New York Central and Hudson River Railroad Company as principal, and The National Surety Company having an office and principal place of business at # 346 Broadway, borough of Manhattan, city of New York, as surety, are held and firmly bound unto Nathan L. Miller, as comptroller, etc., above-named, in the sum of five hundred ($500.) dollars to be paid to the said Nathan L. Miller, as comptroller, etc., his executors or administrators, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated the 22nd day of July, 1904.

Whereas, the above-named appellant has sued out a writ of error to the United States Supreme Court to reverse the judgment in the above entitled case by the supreme court of the State of New York.

Now, therefore, the condition of this obligation is such that if the above-named appellant shall prosecute said writ to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

[L. S.] THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
By W. H. NEWMAN, President.

Attest:
[L. S.] D. W. PARDEE, Secretary.

NATIONAL SURETY COMPANY,
By JOEL RATHBONE, Res. Vice-President.

Attest:
RICHARD J. MORIARTY,
Res. Ass't Secretary.

183 STATE OF NEW YORK, } *ss:*
County of New York, }

On the 26th day of July in the year 1904, before me personally came W. H. Newman to me known who being by me duly sworn did depose and say that he resides in New York; that he is the president of the New York Central and Hudson River Railroad Company, the cor-

oration described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by authority of the board of directors of said corporation, and that he signed his name thereto by like authority.

[L. S.] WILLIAM HUTCHINSON,
Notary Public, # 193, New York County.

184 STATE OF NEW YORK, } ss.:
County of New York, }

On this 22nd day of July 1904, before me personally appeared Joel Rathbone res. vice president of the National Surety Company, with whom I am personally acquainted, who being by me duly sworn, said that he resides in the county of New York; that he is the res. vice president of the National Surety Company, the corporation described in and which executed the within instrument; that he knows the corporate seal of said company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the board of directors of said company, and that he signed said instrument as res. vice president of said company by like authority; and that the liabilities of said company do not exceed its assets, as ascertained in the manner provided in section 3, chapter 720 of New York Session Laws of 1893. And the said *Richard J. Moriarty* further said that he is acquainted with Richard J. Moriarty and knows him to be the res. ass't secretary of said company; that the signature of the said Richard J. Moriarty subscribed to the said instrument is in the genuine handwriting of the said Richard J. Moriarty and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said res. vice president.

BELLE F. JAIS,
Notary Public for the County of N. Y., No. 47.

Certificate filed in Kings, Westchester Richmond & Queens counties.

Copy of By-law.

Be it remembered, that at a regular meeting of the board of directors of the National Surety Company, duly called and held on the 6th day of February, 1900, a quorum being present, the following by-law was adopted:

"ARTICLE XIII, SEC. 1. *Signatures Required.*—All bonds, recognizances, contracts of indemnity and other writings obligatory in the nature thereof, shall be signed by the president, the vice-president, the second vice-president, a resident vice-president, or an attorney in fact, and, except when signed by an attorney in fact, shall have the seal of the company affixed thereto, duly attested by the secretary, an assistant secretary or a resident assistant secretary.

"The vice-president, second vice-president and resident vice-presi-
"dents shall each have authority to sign such instruments whether
"the president be absent or incapacitated or not; and the assistant
"secretaries and resident assistant secretaries shall each have au-
"thority to seal and attest such instruments, whether the secretary
"be absent or incapacitated or not. All such instruments executed
"as herein provided shall be as binding upon the company as if
"the same were signed by the president, duly sealed and attested
"by the secretary."

STATE OF NEW YORK, }
County of New York, } ss:

I, Richard J. Moriarty res. ass't secretary of the National Surety Company, have compared the foregoing copy of by-law with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original by-law.

Given under my hand and seal of the company this 22nd day of July 1904.

[L. S.] RICHARD J. MORIARTY,
Res. Ass't Secretary.

185 [Endorsed:] This bond both as to form and sufficiency of surety approved this 28th day of July 1904 Alton B. Parker Ch. J. Approved as to sufficiency Aug. 3 1904 John Cunneen att'y gen'l. S. T. C.

186 Assignment of Errors.

In the Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of the New York Central and Hudson River Railroad Company, Plaintiffs in Error,
against
NATHAN L. MILLER, as Comptroller of the State of New York, Defendant in Error.

To the honorable justices of the Supreme Court of the United States:

Come now the said petitioners, plaintiffs in error, and respectfully show to the court that there is in the said record and proceedings manifest error upon which they will rely in and for their prosecution of the writ of error in the above entitled cause, to-wit:

I. That the said supreme court of the State of New York erred in rendering, and the said court of appeals of the State of New York erred in affirming the final order and judgment wherein and whereby the provisions of section 182 of the tax law of the State of New York, and the authority exercised thereunder by the comptroller of the

State of New York, were held valid in and for franchise taxation of and upon the basis of the capital of the said relator invested and employed in the average number of its passenger, freight, mail, baggage and express cars in obedience to laws of the United
187 States and in due course of business delivered by relator to and employed and used by other common carrier railroad corporations outside of the State of New York in the through carriage of persons and property starting or consigned from the State of New York, New Jersey and Pennsylvania, respectively, and destined to other States, and *vice versa*, and in transportation of persons and property between points in respective States other than and over routes wholly outside of the State of New York, and that such franchise tax did not offend against the commerce clause, article 1, section 8 of the Constitution of the United States.

II. That the said courts, respectively, erred in holding and deciding the said statute valid authority of and for franchise taxation upon the basis of the capital of the said relator invested and employed in the average number of its passenger, freight, baggage, mail and express cars, which in obedience to requirements of the United States statutes, and in the due process of business were transferred and surrendered by said relator to the possession of and used successively and interchangeably by other common carrier railroad corporations outside of the State of New York in the through carrying of persons and property between points in respective States other than New York State, and over routes outside of that State, all under authority of and in the exercise of franchises granted to them respectively by respective States other than the State of New York, and that franchise tax thus computed and imposed did not impair the obligations of the contracts, arising upon, inhering in and pertaining to the grant and use of the respective franchises whereunder the said cars of relator were thus operated and used outside of the State of New York by common carrier railroad corporations
188 foreign to said State of New York, and hence was not repugnant to article 1, section 10 of the Constitution of the United States.

III. That the said courts, respectively, erred in holding and deciding the said statute valid authority of and for franchise taxation upon the basis of the capital of the said relator invested and employed in the average number of its passenger, freight, baggage, mail and express cars, which in the course of transportation business and in obedience to the requirements of the United States statutes, were by the said relator delivered to corporations foreign to the State of New York, and by such foreign corporations employed and used upon railroads operated by them respectively, in respective States other than New York State in the through carrying of persons and property starting or consigned from points in New York, New Jersey or Pennsylvania, and destined to points outside of either thereof, and *vice versa*, and between points foreign to said several States via and over lines of railroad situate without the State of New

York, all in the exercise of and under the authority of franchises granted by the respective States within the said operations were so carried on and conducted, and that such franchise tax did not impair the obligations of the contracts pertaining to such use of relator's cars by other corporations, and hence was not repugnant to article 1, section 10 of the Constitution of the United States.

IV. That the said courts, respectively, erred in holding and deciding the said statute valid authority of and for and the exercise thereunder of said authority the valid imposition of franchise taxation in and by the State of New York upon the basis of the
189 capital of relator invested and employed in the average number of its cars which, in obedience to the requirements of the statutes of the United States, were delivered by relator to transportation corporations foreign to the State of New York, and operated and used by them wholly within States other than New York State, under authority of, and in the exercise of franchises granted by such other States, respectively, to corporations created by them, and that the said statute and the said tax imposed under its authority, did not operate to deprive relator of its property or property rights without due process of law, and hence did not contravene the provisions of the fourteenth amendment to the Constitution of the United States.

V. That the said courts, respectively, erred in holding and deciding that franchise taxation prescribed by, and imposed by the said comptroller of the State of New York under the supposed authority of, said statute, upon the basis of relator's capital invested in the average number of its cars by it operated and used in the States of New Jersey and Pennsylvania, respectively, in the transportation of persons and property between points within either of the said respective States, and between points within and points without either thereof, and between points of starting or shipment and points of destination without via and over routes in part within the said respective States, all under authority of and in the exercise of franchises granted by those States, respectively, to corporations created thereby and domiciled therein, and by the latter leased to the said relator, did not burden or regulate interstate or foreign commerce, and hence did not offend against or contravene the provisions of the commerce clause, article 1, section 8 of the
190 Constitution of the United States; and did not impair the obligations of contracts arising upon or inhering such obedience to the commerce laws of the United States, and therein did not contravene article 1, section 10 of the Constitution of the United States.

VI. That the said courts, respectively, erred in holding and deciding the said statute valid authority of and for franchise taxation in and by the State of New York upon the basis of the capital of relator invested and employed in the average number of its cars operated and used by it in the States of New Jersey and Pennsylvania in the exercise of franchises granted by those States, respect-

ively, and leased or remised by the grantees thereof to the said relator, and exercised by it in the carrying of commerce between points respectively within, and between points within and points without those respective States, and that therein and thereby the said statute did not impair the obligations or contracts pertaining to interstate and foreign commerce, and hence did not offend against the provisions of article 1, section 10 of the Constitution of the United States.

VII. That the said courts, respectively, erred in holding and deciding that franchise taxation imposed by the said comptroller of the State of New York under the supposed authority of said statute, upon the basis of the capital of said relator invested in the average number of its cars by it operated and used in the States of New Jersey and Pennsylvania, respectively, in the exercise of franchises granted by those States, respectively, to corporations created thereby and domiciled therein, and by them leased to relator and by it exercised in commerce local to said respective States, as also
191 in commerce between those respective States and other States, did not impair the obligations of the contracts inhering in, arising upon and pertaining to the grant and use of the franchises granted by the said respective States, within their domain, respectively, and hence did not therein offend against the provisions of article 1, section 10 of the Constitution of the United States.

VIII. That the said courts, respectively, erred in holding and deciding the said statute valid authority of and for franchise taxation upon the basis of the capital of the said relator invested and employed in the average number of its cars used wholly outside of the State of New York, in the operation of railroads situate in other States, owned by corporations created by and domiciled within such other respective States, and leased to and operated by the said relator under authority of the franchises of its said respective lessors, granted to them by the said States, respectively, and that such franchise tax did not impair the obligations of the said contracts of lease, and hence was not therein repugnant to article 1, section 10 of the Constitution of the United States.

IX. That the said courts, respectively, erred in holding and deciding the said statute valid authority of and for and the exercise thereunder of said authority the valid imposition of franchise taxation upon the basis of the capital of the said relator invested and employed in the average number of its passenger, freight, baggage, mail and express cars employed and used by relator in the States of New Jersey and Pennsylvania, respectively, upon lines of railroad situate in and built and owned by corporations charte-d by and domiciled in said respective States, and leased by such corporations to and operated by the said relator, in the carrying of State and interstate commerce under and subject unto the franchise granted and regulation prescribed by such respective State wherein the said road is situate, and that such franchise tax did not transcend the territory and power of the jurisdiction of the State of New

York and of its said comptroller and did not deprive relator of its property or property rights without due process of law, and hence did not therein contravene the fourteenth amendment of the Constitution of the United States.

192 X. That the said courts, respectively, erred in holding and deciding the said statute of the State of New York to be valid authority for, and the said authority of the comptroller of the State of New York exercised thereunder to constitute valid imposition of, the said franchise tax imposed and computed upon the basis of the capital of the said relator invested and employed in the average number of its cars, which, having in obedience to the requirements of the laws of the United States passed out of the State of New York and out of the possession, custody and control of the said relator, were operated and used by railroad corporations created by other States upon their railroads there situate, under authority of franchises granted by such other States, respectively, in common carrier transportation local to said respective States and between those and other States, and that such franchise tax thus computed and imposed did not constitute a burden upon or regulation of commerce among the several States, and did not impair the obligations of the contracts under which in obedience to the laws of the United States the said relator transferred and surrendered, and the said respective foreign corporations in turn directly or remotely acquired possession and custody of and used the said cars of said relator, and did not impair the obligations of the contracts inhering in, arising upon and incident to the grant and use in such other States of the franchises granted by them, respectively, and did not derogate from the diginity of such other States or otherwise transcend the territory or power of the jurisdiction of the State of New York or of its said comptroller, and hence that the said franchise tax thus computed and imposed did not offend against and was not violative of or repugnant to either article 1, section 8, or article 1, section 10 or the fourteenth amendment of the Constitution of the United States.

193 XI. That the said courts, respectively, erred in holding and deciding the said statute of the State of New York to be valid authority for, and the said authority of the comptroller of the State of New York exercised thereunder to constitute valid imposition of the said franchise tax computed and imposed upon the basis of the capital of the said relator invested and employed in the average number of its cars operated and used in the States of New Jersey and Pennsylvania, respectively, upon lines of railroad situate therein, built, maintained and operated under authority of franchises granted by those respective States to corporations created thereby, and domiciled therein, and under leases or grants of trackage rights of railroad and accompanying franchise demised or let by the said owning corporations to the said relator, and thus operated and used in and about common carrier transportation local to the said States of New Jersey and Pennsylvania, respectively, and between those respective States and other States of the United States and dominions

foreign to the United States, and that such franchise tax thus computed and imposed did not constitute a burden upon or regulation of commerce among the several States or foreign commerce, or commerce within and domestic to such respective State, and did not impair the obligations of the contracts inhering in, arising upon and incident to the grant and use in such respective States of New Jersey and Pennsylvania of the franchises granted by them respectively, or of the contracts of lease and agreements of and for trackage rights whereby and whereunder the said owning corporations granted, demised and let the said property and property rights and franchises to relator and relator thus operated in the said respective States under authority thereof and of said franchises, and did not derogate
194 from the dignity of such respective State or thus or otherwise transcend the territory or power of the jurisdiction of the State of New York or of its said comptroller, and hence that the said franchise tax thus computed and imposed did not contravene or offend against and was not violative of or repugnant to either article 1, section 8, or article 1, section 10, or the fourteenth amendment of the Constitution of the United States.

XII. That the said courts, respectively, erred in so holding and deciding as therein and thereby to uphold and sustain the validity of the said statutory provisions and of the authority of the said comptroller of the State of New York exercised thereunder in the said computation and imposition of the said franchise tax as not constituting a burden upon or regulation of commerce domestic to and within States other than the State of New York, as not constituting a burden upon or regulation of commerce among the several States or with foreign countries, as not impairing the obligations of contracts arising upon and pertaining to commerce within and domestic to States other than the State of New York, as not impairing the obligations of contracts arising upon or pertaining to commerce among the several States and with foreign countries, as not impairing the obligations of contracts arising upon and pertaining to the grant of franchises by and the exercise and use thereof within States other than the State of New York, as not derogatory to the dignity of a sister State, as not transcending the territory or power of the jurisdiction of the State of New York or of its said comptroller, and as not depriving the said relator of its property or property rights without due process of law, and hence denying to the said relator the relief, order and decree herein prayed for, and in rendering judgment against them for costs and disbursements in the said cause and proceeding.

195 XIII. That the said courts, respectively, erred in holding and deciding in favor of the validity of the said statute of the State of New York, and the authority of the said comptroller of the State of New York by him exercised thereunder, and consequent thereupon that the said petitioners, plaintiffs in error, were disentitled to have and maintain their said cause and proceeding and to have the relief, order and decree therein and thereby prayed for.

XIV. That the said courts, respectively, erred in holding and deciding in favor of the validity of the said statute of the State of New York and of the said authority exercised thereunder, whereby the said franchise tax was in manner aforesaid computed and imposed, as not repugnant to the Constitution of the United States, and consequent thereupon denying to said relator the relief, order and decree prayed for in its complaint in said cause.

XV. That the said courts, respectively, erred in that their said respective final order and judgment were for and in favor of the said respondent, defendant in error, as comptroller of the State of New York, when the same should have been for and in favor of the said petitioners.

The said petitioners, plaintiffs in error, pray judgment that the said final order and judgment aforesaid be in all things reversed, set aside and held for naught, and the said relator may be restored to all things which it has lost by occasion thereof.

IRA A. PLACE,
Attorney for Plaintiffs in Error.

THOMAS EMERY, Of Counsel.

196 [Endorsed:] United States Supreme Court. The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, plaintiffs in error, against Nathan L. Miller, as comptroller of the State of New York, defendant in error. Assignment of errors. Tax of 1900. Ira A. Place, attorney for plaintiffs in error, Grand Central station, borough of Manhattan, New York city, N. Y. To John Cunneen, Esq., att'y for def't in error. Service of a copy of the within assignment of errors is hereby admitted this 3 day of Aug., 1904. John Cunneen, att'y gen'l, att'y for def't in error. S. T, C.

197 Citation.

UNITED STATES OF AMERICA, *ss:*

To Nathan L. Miller, as comptroller of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of New York for the county of Albany, wherein The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 28th day of July, in the year of our Lord one thousand nine hundred and four.

ALTON B. PARKER,
Chief Judge of the Court of Appeals of the
State of New York.

198 [Endorsed:] United States Supreme Court. The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, plaintiffs in error, against Nathan L. Miller, as comptroller of the State of New York, defendant in error. Citation. Tax of 1900. Ira A. Place, attorney for plaintiffs in error, Grand Central station, borough of Manhattan, New York city, N. Y. To John Cunneen, Esq., att'y for def't in error Service of a copy of the within citation with notice of allowance is hereby admitted this 3d day of Aug. 1904 John Cunneen att'y gen'l att'y for def't in error S. T. C.

199 Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the supreme court of the State of New York, possessors of the return and record in the action in which The People of the State of New York upon the relation of The New York Central and Hudson River Railroad Company are plaintiffs and Nathan L. Miller, as comptroller of the State of New York, is defendant, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea in the court of appeals of the State of New York, wherein final judgment upon return from the supreme court of the State of New York was rendered March 16, 1904, that being the highest court of law and equity of the said State in which a decision could be had in the suit or action between The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, plaintiffs in error, and Nathan L. Miller, as comptroller of the State of New York, defendant in error, and which had been remitted to said supreme court for execution and is now before you or some of you in said court; wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity, a manifest error hath happened to the
200 great damage of the said, The New York Central and Hudson River Railroad Company, as by its complaint appears we being willing that error, if any hath been, should be duly cor-

rected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the said Supreme Court, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 2nd day of August, in the year of our Lord one thousand nine hundred and four.

W. S. DOOLITTLE,
Clerk of the United States Circuit Court
for the Northern District of New York,
By C. W. HIGGISON, Deputy.

[SEAL.]

Allowed by—
ALTON B. PARKER,
Chief Judge of the Court of Appeals
of the State of New York.

STATE OF NEW YORK, } ss:
County of Albany, Clerk's Office, }

I, John Franey, clerk of the said county, and also clerk of the supreme and county courts, being courts of record held therein, do hereby certify that I have compared the annexed copies of writ of error; citation; assignment of errors; bond; petition for writ of error; order and judgment; memoranda opinion; papers on appeal from order; opinion; papers on appeal from order with the originals thereof, filed in this office on the 3rd day of August, 1904, and that the same are correct transcripts therefrom, and of the whole of said originals.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 3rd day of August, 1904.

[Seal Albany County, July, 1847.]

JOHN FRANEY, Clerk.

201 [Endorsed:] United States Supreme Court. The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, plaintiffs in error, against Nathan L. Miller, as comptroller of the State of New York, defendant in error. Writ of error. Tax of 1900. Ira A. Place, attorney for plaintiffs in error, Grand Central station, borough of

Manhattan, New York city, N. Y. To John Cunneen, Esq. att'y for def't in error Service of a copy of the within writ of error, with notice of allowance, is hereby admitted this 3 day of Aug. 1904 John Cunneen att'y gen'l att'y for def't in error. S. T. C.

Endorsed on cover: File No. 19,444. New York supreme court. Term No. 81. The People of the State of New York upon the relation of The New York Central & Hudson River Railroad Company, plaintiff in error, *vs.* Nathan L. Miller, as comptroller of the State of New York. Filed August 16", 1904. File No. 19,444.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 82.

THE PEOPLE OF THE STATE OF NEW YORK, UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

NATHAN L. MILLER, AS COMPTROLLER OF THE STATE OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

(19,445.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 82.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

NATHAN L. MILLER, AS COMPTROLLER OF THE STATE OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 7, 1905.

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a In the Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of the New York Central and Hudson River Railroad Company
against
NATHAN L. MILLER, as Comptroller of the State of New York.

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Ira A. Place, attorney for appellant, Grand Central station, borough of Manhattan, N. Y. city, N. Y.

John Cunneen, attorney-general, attorney for respondent, capitol, Albany, N. Y.

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1 Notice of Application for an Order for a Writ of Certiorari and for Writ.

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of the New York Central and Hudson River Railroad Company
against
NATHAN L. MILLER, as Comptroller of the State of New York.

SIR: Please take notice that a motion will be made by and on behalf of the New York Central and Hudson River Railroad Company, at a special term of the supreme court in and for the county of Albany, to be held at the city hall in the city of Albany, N. Y., on the 26th day of September, 1903, at 10.30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order for a writ of certiorari, and also for a writ of certiorari, to be directed to you, to review the determination of the comptroller of the State of New York, dated August 10, 1903, a copy of which is hereto annexed, to be returnable according to law, and for
2 such other and further relief as may be proper.

Dated New York, September 2, 1903.

Yours, etc.,
IRA A. PLACE,
Attorney for Applicant, The New York Central and Hudson River Railroad Company, Room 417, Grand Central Station, Borough of Manhattan, New York City, N. Y.

To Hon. Nathan L Miller, comptroller of the State of New York, Albany, N. Y.

"STATE OF NEW YORK:

COMPTROLLER'S OFFICE,
ALBANY, Aug. 10th, 1903.

In the Matter of the Application of NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY for a Revision of Taxes Assessed Against it under Chapter 908, Laws of 1896, and the Acts Amendatory Thereof.

An application having been made by the above-named New York Central and Hudson River Railroad Co. for a revision and re-
3 settlement of the taxes assessed and determined against it by the comptroller of the State of New York, for the one year ending Oct. 31, 1901, and the said comptroller having heard proofs offered on behalf of the said New York Central & Hudson River R. R. Co. in support of said application, and after due consideration thereof, the comptroller does hereby determine that the assessment heretofore made against the said New York Central & Hudson River R. R. Co., for the sum of two hundred thirty-five thousand seven hundred fifty-five dollars, should be reduced to the sum of one hundred seventy-three thousand three hundred eighty-nine and 74/100 dollars; which said sum of one hundred seventy-three thousand three hundred eighty-nine and 74/100 dollars is hereby determined as the amount which said New York Central & Hudson River Railroad Co. is liable to pay under the provisions of chapter 908, Laws of 1896, and the acts amendatory thereof, for the one year ending Oct. 31, 1901, and the said company has been credited on the books of this department with the sum of $62,365.26.

NATHAN L. MILLER,
Comptroller."

4 At a special term of the supreme court, held in and for the county of Albany, at the county court house in the city of Albany, N. Y., on the 26th day of September, 1903.

Present: Hon. D. Cady Herrick, justice.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of the New York Central and Hudson River Railroad Company
against
NATHAN L. MILLER, as Comptroller of the State of New York.

Order for Issuance of Writ of Certiorari.

On reading and filing the petition verified and dated the 9th day of September, 1903, of the New York Central and Hudson River Railroad Company, and upon the undertaking heretofore filed by the said railroad company, pursuant to section 197 of the tax law, and upon the notice of this application duly served on the comptroller of the State of New York, and after hearing Harris & Rudd,

Esqrs., of counsel for the petitioner, and on motion of Ira A. Place, Esq., attorney for the petitioner, it is

Ordered, that a writ of certiorari do issue from and out of this court pursuant to the prayer of the petitioner, directed to Nathan L.
5 Miller, as comptroller of the State of New York, to review the decision and determination of the said comptroller mentioned and described in the petition, and the question involving the merits therein mentioned, both upon the law and the facts, which writ shall be returnable within twenty days after service thereof upon the said comptroller, at the office of the clerk of Albany county.

Enter.

JOHN FRANEY, Clerk.

6 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of the New York Central and Hudson River Railroad Company
against
NATHAN L. MILLER, as Comptroller of the State of New York.

Writ of Certiorari.

Whereas, we have been informed by the verified petition of the New York Central and Hudson River Railroad Company, dated and verified the 9th day of September, 1903, that certain proceedings have been had before the comptroller of the State of New York in a certain matter entitled "In the matter of the application of the New York Central and Hudson River Railroad Company for a revision and readjustment of the account heretofore audited and stated by the comptroller of the State of New York for taxes under section 182 of the tax law," for the year ending October 31st, 1901, upon the application of the said railroad company to revise and readjust an account theretofore audited and stated by the said comptroller of the State of New York for taxes to be paid by the said The New York Central and Hudson River Railroad Company under section 182 of the tax law, the petition upon which the said
7 application was made being verified March 7, 1902, and a hearing upon such application having been had on the 19th day of February, 1903, and the said comptroller having thereafter made his determination and sent written notice of his determination upon such application to the applicant, the petitioner herein, allowing in part and denying in part the application for revision or readjustment of the said account, and the said The New York Central and Hudson River Railroad Company having now made application to this court for a writ of certiorari to review, in so far as the said application was denied and refused, the said decision and determination of the said comptroller.

And we being willing for certain purposes to be certified of such proceedings, if any such were had, do hereby command and strictly enjoin Nathan L. Miller, as comptroller of the State of New York, that he certify and return all and singular the evidence before him on such application, and all the papers and proofs upon the original statement of such account and all proceedings thereon, and all his decisions and actions in the premises, with all the evidence, documents, reports, records and papers relating thereto in his possession, or under his control, submitted to or considered by him, concerning the said account and the grounds of his refusal to revise and readjust the same, as prayed for in the petition, within twenty days after the service upon him of this writ, at the office of the clerk of Albany county, under his proper hand, pursuant to the provisions of the tax law and the provisions of title II., of chapter 16 of the Code of Civil Procedure, so that our supreme court may further cause to
8 be done thereon what of right and according to law ought to be done, and let the defendant have then and there this writ.

Witness the Hon. D. Cady Herrick, justice of our honorable court, at the court house in the city of Albany, N. Y., this 26th day of September, 1903.

JOHN FRANEY, Clerk.

IRA A. PLACE,
Attorney for the Relator, Grand Central Station,
Borough of Manhattan, New York City, N. Y.

The above writ is hereby allowed this 26th day of September, 1903.

D. CADY HERRICK,
Justice Supreme Court.

9 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of the New York Central and Hudson River Railroad Company *against* NATHAN L. MILLER, as Comptroller of the State of New York. } Petition for Writ.

To the supreme court of the State of New York:

The petition of the New York Central and Hudson River Railroad Company respectfully shows:

I. This petitioner, The New York Central and Hudson River Railroad Company, is a domestic railroad corporation, having but one kind of capital stock, organized and existing under the laws of the State of New York, for steam surface railroad purposes, and is engaged in operating certain railroads owned or leased in the State of New York and certain railroads leased in other States, and was such railroad corporation during the year ending October 31, 1901.

II. The defendant, Nathan L. Miller, is and has been since December 30, 1901, the comptroller of the State of New York.

10 III. That on or before November fifteenth, 1901, this petitioner duly made a written report to the comptroller of the State of New York, as required by subdivision 1 of section 189 of the tax law of the State of New York, being chapter 908 of the Laws of 1896 of the State of New York.

IV. That the said report showed the condition of this petitioner at the close of its business on October 31st preceding, and stated the amount of its authorized capital stock to be $115,000,000; that the date of the payment of each dividend declared by it during the year ending with said 31st day of October was as follows: January 15, April 15, July 15, October 15, 1901; that the rate per centum of the said dividends was five per centum; that such dividends amounted to less than six per centum on the par value of the capital stock of this petitioner; that the entire amount of the capital of such corporation, this petitioner, was $345,079,038.31; and that the capital employed by such corporation, this petitioner, in this State during the year ending said October 31, 1901, was $215,452,749.95; and that the capital employed by such corporation, this petitioner, outside of the State of New York, during such year was $129,626,288.36; that is, the proportion or percentage of capital employed by it within this State was sixty two and forty-four one-hundredths (62 44/100) per cent. of the entire amount of its capital, and the proportion or percentage of capital employed by it outside of this State was thirty-seven and fifty-six one-hundredths (37 56/100) per cent. of the entire amount of its capital; and that therefore, from November 1, 1900, to October 31, 1901, both inclusive, $71,806,000 was such portion of the capital stock at par of such corporation, this petitioner, as the amount

11 of capital employed within this State bears to the entire capital of the corporation.

V. That subsequent to the said 15th day of October, 1901, the said comptroller audited and stated the account for taxes to be paid by this petitioner under section 182 of the tax law, and sent notice thereof to this petitioner.

VI. That the account so audited and stated was in words and figures following, to wit:

"COMPTROLLER'S OFFICE, ALBANY, N. Y.

The New York Central and Hudson River R. R. Co., Grand Central Sta., N. Y. C.

John Carstensen, Compt., in Account with the State of New York, Dr.

For tax on franchise of business, based on value of capital stock employed in New York State, per chapter 908, Laws of 1896, and acts amendatory thereof, for the year ending October 31, 1901, as per report filed:

Appraised value of capital stock, $157,170,000.00, tax 1½ mills..... $235,755.00

VII. That on or about the 7th day of March, 1902, and within one year from the time that the said account had been audited and stated, and notice thereof sent to this petitioner, this petitioner applied to the said comptroller to revise and readjust the said account and to have said account resettled by striking therefrom, or by crediting to the account of this petitioner, the sum of $128,046.00; that the said application was made by written
12 petition, duly verified on or about the 7th day of March, 1902, and entitled "In the matter of the application of the New York Central and Hudson River Railroad Company for a revision and readjustment of the account heretofore audited and stated by the comptroller of the State of New York for taxes under section 182 of the tax law; "that upon such application said comptroller, on or about the 10th day of March, 1902, granted a rehearing, and subsequently fixed the 19th day of February, 1903, as the day upon which the petitioner might be heard upon such application; that on the said 19th day of February, 1903, this petitioner duly appeared by its counsel before the Honorable Otto Kelsey, the deputy comptroller, representing the said comptroller, and gave testimony in support of said application; that upon said hearing it appeared from the revised and corrected figures that the entire amount of the capital of said corporation, this petitioner, was of the value and sum of $343,366,340.82, of which the amount of $215,205,465.70 and no more constituted its capital employed within this State during said tax year, and $128,160,875.12 was the amount of its capital employed outside of this State during said tax year; and thus that the proportion or percentage of its capital employed within this State was sixty-two and sixty-eight one-hundredths per cent. of its entire capital, and the proportion or percentage of its capital employed outside of this State was thirty-seven and thirty-two one-hundredths per cent. of its entire capital; that the average value of its capital stock during said tax year was $148.75 per share, showing the average value of its $115,000,000 of capital stock during said tax year to have been the sum of $171,062,500.00 and no more, of which sixty-two and sixty-eight one-hundredths per cent., to wit, $107,221,975.00 was
13 such portion of the value of the capital stock of such corporation, this petitioner, as the amount of its capital employed within this State bore to the entire capital of said corporation; that thereafter the said comptroller made his determination, and sent written notice of his determination upon the said application, to the applicant, this petitioner, the said determination being as follows:

"STATE OF NEW YORK:

COMPTROLLER'S OFFICE,
ALBANY, Aug. 10th, 1903.

In the Matter of the Application of NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY for a Revision of Taxes Assessed Against it under Chapter 908, Laws of 1896, and the Acts Amendatory Thereof.

An application having been made by the above-named New York Central & Hudson River Railroad Co., for a revision and resettlement of the taxes assessed and determined against it by the comptroller of the State of New York for the one year ending Oct. 31, 1901, and the said comptroller having heard the proofs offered on behalf of the said New York Central & Hudson River R. R. Co., in support of said application, and after due consideration thereof,
14 the comptroller does hereby determine that the assessment heretofore made against the said New York Central & Hudson River R. R. Co., for the sum of two hundred thirty-five thousand seven hundred fifty-five dollars, should be reduced to the sum of one hundred seventy-three thousand three hundred eighty-nine and 74/100 dollars; which said sum of one hundred seventy-three thousand three hundred eighty-nine and 74/100 dollars is hereby determined as the amount which said New York Central & Hudson River Railroad Co. is liable to pay under the provisions of chapter 908, Laws of 1896, and the acts amendatory thereof for the one year ending Oct. 31, 1901, and the said company has been credited on the books of this department with the sum of $62,365.26.

NATHAN L. MILLER,
Comptroller."

VIII. That in and by his determination upon the said application and resettlement and readjustment of the said tax at and as of the sum of $173,389.74, the said comptroller computed the same at one and one-half mills upon each dollar of a valuation of $115,593,160.00; that the said valuation of $115,593,160.00 bears the same relation and proportion to $171,062,500.00, the average value of the entire capital stock of such corporation, this petitioner, during said tax year, as the amount of $232,025,139.19 bears to $343,366,340.82, the amount of the entire capital of such corporation, this petitioner; that the said amount of $232,025,139.19 included and embraced entire the $16,079,369.25, the amount and value of the average portion of the rolling stock of said corporation, this petitioner, which was proven before the said comptroller to have been continuously employed outside of this State during the said tax year; that
15 this petitioner then insisted, and ever since has insisted and now insists, that the said tax of $173,389.74 upon the said $115,593,160.00 valuation of its said capital stock was erroneously and unlawfully assessed or imposed, and payment thereof could not

and cannot be lawfully demanded, and that the average portion of the average value of the capital stock of such corporation, this petitioner, throughout the said year which bore the same relation to the average value of the entire capital stock, as the amount of capital employed within this State bore to the entire capital of the corporation, was $107,221,975.00; and that upon that sum only could such taxes be levied or imposed at the rate of one and one-half mills, amounting to $160,832.96 and no more, and that there should be such resettlement of said account as would result in striking therefrom or crediting to the account of said petitioner any and all excess of that sum; and then insisted and has ever since insisted and now insists that such portion of the value of the capital stock of the said corporation. this petitioner, as bore the same relation to the total value of its entire capital stock during said tax year as the amount and value of the average portion of its rolling stock continuously employed outside of this State during said tax year, bore to its entire capital wheresoever employed, during said year, did not nor did any part thereof constitute any part of the amount of its capital stock employed within this State, and that no tax could be lawfully computed, assessed or imposed upon the basis of such said portion of its capital stock; and that whatsoever sum of tax was computed, assessed or imposed upon the basis of such said portion of its capital stock should be either stricken off or credited to the account of said corporation, this petitioner; that the basis of computation of
16 the said tax as resettled and readjusted by the said comptroller was as follows:

$$x : 171,062,500.00 :: 232,025,139.19 : 343,366,340.82.$$

In this statement $x = $115,593,160.00, and the tax thereon at 1½ mills is $173,389.74.

That the deduction from the said $232,025,139.19 of the $16,079,369.25, the amount and value of the average portion of the rolling stock of said corporation, this petitioner, proven before the said comptroller to have been continuously employed outside of this State during the said tax year, shows $215,945,769.94 and no more, as being the amount and value of the capital of said corporation, this petitioner, employed within this State during said tax year; that thus corrected the statement is as follows:

$$x : 171,062,500.00 :: 215,945,769.94 : 343,366,340.82.$$

In this statement $x = $107,582,540.51, and the tax thereon at 1½ mills is $161,373.81, thus showing the said corporation, this petitioner, entitled to further resettlement of the said tax by striking therefrom or crediting to this petitioner's account the further sum of $12,015.93.

IX. That heretofore this petitioner duly deposited with the treasurer of the State of New York the full amount of the taxes, percentage, interest and other charges audited and stated in the said account, and duly filed an undertaking with the said comp-

troller in an amount and with sureties approved by a justice of the supreme court of the State of New York, to the effect that if the said writ is dismissed, or the said determination is confirmed, this petitioner will pay any and all charges and costs which may accrue against it in the prosecution of the writ, including costs of all appeals, a copy of such undertaking being hereto annexed, and marked "Exhibit A."

17 X. That your petitioner is aggrieved by the said determination of the said comptroller. That no previous application for this writ has been made to any court or judge.

Wherefore, your petitioner, desiring to review both upon the law and the facts said determination of the said comptroller, upon such application made to him by your petitioner for a revision and resettlement of the said account as hereinabove set forth, prays that a writ of certiorari may issue out of the supreme court of the State of New York, directed to the said comptroller of the State of New York, commanding the said comptroller to certify and return at the office of the clerk of Albany county all and singular the evidence before him on such application, and all the papers and proofs upon the original statement of such account, and all the proceedings thereon and all his decisions and actions in the premises, with all the evidence, documents, reports, records and papers relating thereto in his possession or under his control, submitted to or considered by him, concerning the said account and the grounds for his refusal to revise and readjust the same, in and regarding the particulars hereinabove set forth, to the end that his said decisions and determinations may be reviewed and the said original and resettled account corrected and restated, and that this petitioner have such other and further relief as may be proper.

Dated New York, September 9, 1903.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
By E. V. W. ROSSITER, Vice-President.

IRA A. PLACE,
Attorney for Petitioner, Grand Central Station,
Borough of Manhattan, New York City, N. Y.

18 STATE OF NEW YORK, }
County of New York, } ss.:

Edward L. Rossiter, being duly sworn, says: That he is an officer of The New York Central and Hudson River Railroad Company, the petitioner above named, to wit: the treasurer thereof; that the foregoing petition is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

E. L. ROSSITER.

Sworn to before me this 9th day of September, 1903.
ALBERT B. QUENCER,
Notary Public (No. 1), New York County.

19 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of the New York Central and Hudson River Railroad Company
against
NATHAN L. MILLER, as Comptroller of the State of New York. } Copy.

Whereas, the above named, The New York Central and Hudson River Railroad Company, heretofore, on or about the 7th day of March, 1902, applied to the comptroller of the State of New York to revise and readjust the account heretofore audited and stated by the said comptroller, imposing a tax upon the said The New York Central and Hudson River Railroad Company for the year ending October 31st, 1901, under section 182 of the tax law, and to have said account resettled by striking therefrom, or by crediting to the account of the said railroad company, the sum of one hundred and twenty-eight thousand and forty-six dollars ($128,046.00), and the said comptroller having thereafter, a hearing having been made upon the said application, made his determination, allowing a credit to the said company on the books of the department of the sum of sixty-two thousand three hundred sixty-five and 26/100 ($62,365.26) dollars, and

20 Whereas, the said The New York Central and Hudson River Railroad Company is dissatisfied and aggrieved by the said determination and intends to review the said determination by writ of certiorari, and desires to file an undertaking with the said comptroller as required by section 197 of the tax law.

Now, therefore, the National Surety Company, a corporation duly authorized by the laws of the State of New York to execute surety bonds, having an office and principal place of business at No. 346 Broadway, borough of Manhattan, city of New York, does hereby undertake that if the said writ of certiorari, which may be granted upon the application of the said The New York Central and Hudson River Railroad Company to review the said determination, be dismissed, or the determination of the comptroller be confirmed, the said The New York Central and Hudson River Railroad Company will pay all costs and charges which may accrue against it in the prosecution of the said writ, including the cost of all appeals, not exceeding the sum of five hundred dollars ($500).

Dated, New York, September 5th, 1903.

NATIONAL SURETY COMPANY,
[L. S.] By JOEL RATHBONE,
Res. Vice-President.

Attest:
RICHARD J. MORIARTY,
Res. Ass't Secretary.

STATE OF NEW YORK, }
County of New York, } ss:

On this 5th day of Sept., 1903, before me personally appeared Joel Rathbone, res. vice-president of the National Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the county of New York; that
21 he is the res. vice-president of the National Surety Company, the corporation described in and which executed the within instrument; that he knows the corporate seal of said company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the board of directors of said company, and that he signed said instrument as res. vice-president of said company by like authority; and that the liabilities of said company do not exceed its assets, as ascertained in the manner provided in section 3, chapter 720 of New York Session Laws of 1893. And the said Joel Rathbone further said that he is acquainted with Richard J. Moriarty, and knows him to be the res. ass't secretary of said company; that the signature of the said Richard J. Moriarty subscribed to the said instrument is in the genuine handwriting of the said Richard J. Moriarty, and was thereto subscribed by the like order of the said board of directors, and in the presence of him, the said res. vice-president.

EDITH BALDWIN,
Notary Public in the County of Kings, No. 122.

Certificate filed in New York, Westchester and Richmond counties.

Copy of By-Law.

Be it remembered, that at a regular meeting of the board of directors of the National Surety Company, duly called and held on the 6th day of February, 1900, a quorum being present, the following by-law was adopted:

"Article XIII. SEC. 1. *Signatures Required.*—All bonds, recogni-
" zances, contracts of indemnity and other writings obligatory
22 " in the nature thereof, shall be signed by the president, the
" vice-president, the second vice-president, a resident vice-presi-
" dent, or an attorney in fact, and, except when signed by an attorney
" in fact, shall have the seal of the company affixed thereto, duly at-
" tested by the secretary, an assistant secretary or a resident assistant
" secretary. The vice-president, second vice-president and resident
" vice-presidents shall each have authority to sign such instruments
" whether the president be absent or incapacitated or not; and the as-
" sistant secretaries and resident assistant secretaries shall each have
" authority to seal and attest such instruments, whether the secretary
" be absent or incapacitated or not. All such instruments executed
" as herein provided shall be as binding upon the company as if the
" same were signed by the president, duly sealed and attested by the
" secretary."

STATE OF NEW YORK, }
County of New York, } ss:

I, Richard J. Moriarty, res. ass't secretary of the National Surety Company, have compared the foregoing copy of by-law with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original by-law.

Given under my hand and seal of the said company this 5th day of Sept., 1903.

RICHARD J. MORIARTY,
[L. S.] Res. Ass't Secretary.

23 Return to Writ of Certiorari.

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* THE NEW YORK Central and Hudson River Railroad Company
vs.
NATHAN L. MILLER, as Comptroller of the State of New York.

Nathan L. Miller, the above named respondent, hereby makes the following return to the writ of certiorari heretofore issued herein:

1st. He admits the allegations contained in paragraphs 1, 2, 3, 5, 6 and 9 of the petition herein.

2d. He admits the following allegations contained in paragraph 7 of the petition herein: "That on or about the 7th day of March, 1902, and within one year from the time that the said account had been audited and stated, and notice thereof sent to this petitioner, this petitioner applied to the said comptroller to revise and readjust the said account and to have said account resettled by striking therefrom, or by crediting to the account of this petitioner, the sum of $128,046.00; that the said application was made by written petition, duly verified on or about the 7th day of March, 1902, and entitled "In the matter of the application of the New York Cen-
24 tral and Hudson River Railroad Company for a revision and readjustment of the account heretofore audited and stated by the comptroller of the State of New York for taxes under section 182 of the tax law;" that upon such application said comptroller, on or about the 10th day of March, 1902, granted a rehearing, and subsequently fixed the 19th day of February, 1903, as the day upon which the petitioner might be heard upon such application; that on the said 19th day of February, 1903, this petitioner duly appeared by its counsel before the Honorable Otto Kelsey, the deputy comptroller, representing the said comptroller, and gave testimony in support of the said application."

3d. He does not admit any other of the allegations contained in

said petition, except as the same are established by the proof taken herein.

4th. He further returns that the decision of the comptroller was duly and regularly made, and that the said relator is not justly aggrieved thereby.

5th. He further returns the proceedings had before him, in addition to those set out in and annexed to the petition herein, and annexed hereto are all of the papers and proceedings before the comptroller which are not annexed to the petition.

In witness whereof, the comptroller has hereunto set his hand and official seal this 20th day of October, 1903.

NATHAN L. MILLER,
[L. S.] By OTTO KELSEY,
Deputy Comptroller.

25 STATE OF NEW YORK:

Comptroller's Office.

In the Matter of the Application of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY for a Revision and Readjustment of Taxes Assessed under the Provisions of Chapter 908, Laws of 1896, and the Acts Amendatory Thereof for the Year Ending October 31st, 1901.

Rehearing held at the office of the State comptroller February 19th, 1903, before Hon. Otto Kelsey, deputy State comptroller.

Appearances: Thomas Emery, as counsel.

F. H. MEEDER, being duly sworn, testified as follows:

It is agreed, that such of the testimony taken in the hearing this day, had upon the tax of 1900 as either party may deem pertinent to the issues upon this hearing may be deemed part of and incorporated in the record of this hearing, together with the objections and exceptions.

Statement of assets October 31st, 1901, marked Exhibit 1, for identification.

26 By Mr. EMERY:

Q. Mr. Meeder, examine the paper headed "Distribution of assets, October 31st, 1901," and marked Exhibit 1 for identification, and state whether or not it was made up by you, or under your direction and supervision?

A. This statement was made up under my supervision and I believe the same to be correct so far as the calculations are concerned.

Q. The figures opposite the various items mean the values, they do?

A. Yes, sir.

Q. Under the headings "In New York State" and "Outside of New York State," respectively, appear opposite the items passenger cars and freight cars divisions under each heading; upon what basis are those—what is the basis of those divisions of value?

A. Those divisions are made upon a car mileage basis.

Q. Car mileage divided with reference to what?

A. With reference to the number of miles made by New York Central cars in the State of New York and outside the State of New York; the percentage that each bears to the total car mileage in and out of the State having been applied to the total valuation of the cars, and the result shown in the column "In New York State" or "Outside New York State;" the item "Stocks of other companies (A)" with the figures in line following it is made up of the figures shown in the paper marked A, attached to and constituting part of this Exhibit 1, for examination.

Q. And what do you say, then, as to whether this statement, Exhibit 1 and the addenda A thereto attached, does or does not correctly show the condition of the New York Central and Hudson River Railroad Company with reference to its capital as of
27 that date, computed upon the basis therein shown?

A. I believe it is correct and computed upon the basis as shown in the statement.

By Mr. MERRILL:

Q. Mr. Meeder, do you know anything about it except as to whether the computations are correct or not, as far as the figures are concerned?

A. Yes, sir, I do.

Q. Well, what do you know?

A. That would take me several months to tell you, but I know that the figures that appear there are taken from the books of the company.

By COUNSEL:

Q. Does or does not this statement entitled "Distribution of assets, October 31st, 1901," marked Exhibit 1 for identification, correctly set forth the property constituting assets of the New York Central and Hudson River Railroad Company at that date, and correctly the amounts of each?

A. Yes, sir.

Q. Under the heading "Outside of New York," and opposite the words "stocks of other companies," appear the figures $111,972,292.96—of what is that composed?

A. Of the items shown on table A, attached to the exhibit.

Q. In the table marked "A," of this same exhibit, opposite the words "M. D. Transportation Company" follow the figures 89 per cent. ditto of $2,597,400, and in the column headed "Outside the State," opposite this, appears $2,311,686.00—how is that division ascertained and upon what is it based?

A. Based upon advice from the office of the M. D. T. Company.

Q. Advice to what effect?

A. Merely to the effect that 89 per cent. of their equipment was employed outside the State.

28 Q. In the body of the exhibit, under the heading "Outside of New York," and opposite the word "McGee's," appear the figures $9,212.21—what is McGee's connection and where is it?

A. That is a short line of road, practically a spur from the Pittsburg and Eastern railroad, which was paid for by the New York Central, and which is located entirely within the State of Pennsylvania.

Q. Under the same head and opposite the words "fuel and supplies," appear the figures $100,000.00—what does that mean; what is that based upon?

A. That is an approximation of the amount of coal and other supplies upon the line of the company's roads in States other than New York.

Exhibit 1 for identification offered in evidence, for the purpose of proving what it purports *fo* show, subject to such explanation as witness has given.

Mr. MERRILL: I object to the admission of so much of the paper as has to do with the determination of the percentage of the Merchants' Despatch Transportation Company investment in this State, and the division of rolling stock within and without the State, and the employment of the capital stock of the New York Central Railroad Company, as set forth by those items in the statement.

Objection as to those items sustained, and balance of statement received and marked "Ex. 1."

Exception as to exclusion.

COUNSEL: I offer to prove by the items of Exhibit 1, objected to and excluded, and by other evidence, that the figures, with reference to and opposite the words "passenger cars" and "freight cars" show the percentum and relative value of such equipment within

29 the State of New York, and the percentage and value thereof employed outside of the State of New York, during the tax year in question, and that of the $2,597,400.00 capital stock of the Merchants' Despatch Transportation Company owned by the New York Central and Hudson River Railroad Company 89 per cent. thereof was employed outside of the State of New York during said year, both of said first computations being based upon the car mileage upon the New York Central lines or within the State and off the New York Central lines outside the State, and the latter, to wit, Merchants' Despatch Transportation Company, being based upon equipment mileage within and without the State.

Mr. MERRILL: Objected to on the ground that the hypothesis is false and erroneous.

Objection sustained.

Exception taken.

By COUNSEL:

Q. Examine the paper marked Exhibit 2 for identification, and state whether it was made by you or under your direction?

A. This statement was made under my direction and supervision.

Q. And what have you to say as to its correctness?

A. I believe it to be a correct statement.

Q. Upon what basis is the division of equipment, as set forth in it?

A. Upon a road-mileage basis.

Q. According to the number of miles of road operated by the New York Central and Hudson River Railroad Company within and outside the State respectively?

A. Yes, sir.

Q. The statements, other than those of the detail of equipment, are simply the totals taken from the Exhibit 1, are they?

A. Yes, sir, they are identical with Exhibit Number One.

Statement offered in evidence.

Objected to by Mr. Merrill on the ground that it is incompetent, irrelevant and immaterial as to ground of division of equipment on basis of road mileage.

Objection sustained.

Exception taken.

By COUNSEL:

Q. Examine the paper marked Exhibit 3 for identification, and say by whom and under whose supervision and direction it was made?

A. This statement was made under my direction and supervision.

Q. Except as regards equipment this is the same as Exhibit 1, is it not?

A. Yes, sir.

Q. And as between the equipment employed in the State and that employed without the State, upon what are the figures based in that regard?

A. Upon this statement we have made a division of the mileage of the freight cars, showing in one group the mileage of the freight cars in New York State and on Vanderbilt lines, whether in or out of the State; in another group the mileage of freight cars outside of New York State and on roads other than Vanderbilt lines we have regarded the percentage which the first group bears to the total of the two groups as the percentage to use in determining the valuation of freight cars in New York State.

Q. And as thus computed what is the amount respectively?

A. The valuation of freight cars employed in New York State employed upon this basis is $18,865,225.67, and outside of the State $8,902,253.98.

Statement offered in evidence.

31 Objected to by Mr. Merrill to that part which relates to division of rolling stock within and without the State on the ground that it is based upon a false hypothesis, and does not show what percentage of the rolling stock of the New York Central and Hudson River Railroad Company is continuously and exclusively without the State of New York.

Objection sustained. Exception taken.

By COUNSEL:

Q. Referring to the Exhibit 1 for identification and upon the basis of computation of the division of the equipment there set out, what is the aggregate of equipment which upon that basis would appear employed outside the State of New York?

A. $9,578,552.44.

Q. Examine the papers marked Exhibit 4 for identification, purporting to show car movements of cars numbered respectively 41,278, 41,038, 59,578, 63,158, 63,123, 63,176, 64,431, 61,834, 14,035, 27,941, 18,236, and state what the fact is as to whether or not those respective statements were prepared under your supervision and are correctly transcribed from the car accountant's records?

A. These were prepared under my direction and I believe they have been correctly transcribed from the records kept by the car accountant.

COUNSEL: I offer this in evidence for the purpose of showing the movements of the respective cars therein mentioned as illustrative of the manner in which the cars owned by the New York Central and Hudson River Railroad Company were employed on lines other than those owned, or in any wise subject to its control during the tax year in question.

32 Objected to by Mr. Merrill as incompetent because they do not show that the cars were continuously and exclusively without the State.

Objection sustained. Exception.

By COUNSEL:

Q. What do you say, Mr. Meeder, as to whether the same methods in this regard prevailed during the year ending October 31st, 1901, as did at the times covered by the various car movements shown in this Exhibit 4?

A. That is to say, do you mean that cars of New York Central were similarly distributed over other roads during that period?

Q. Yes?

A. Yes.

By Mr. MERRILL:

Q. Now, Mr. Meeder, wherever you have used the term car mile-

age in making the calculation which you have presented here to-day, what did you mean by car mileage?

A. I meant the number of miles actually run by freight cars.

Q. Is it not a fact that cars frequently are standing under demurrage?

A. Yes, but in a case of that kind no mileage can be recorded.

Q. Although the cars would be earning —?

A. Not at all; no mileage unless moving.

Q. You don't get demurrage for cars standing on side, &c.?

A. We do on our own roads get demurrage for cars—so-called car service charges, but the movement of a car during car mileage was entirely separate from that.

Q. Now, do you know anything personally about business of the Merchants' Despatch Transportation Company?

A. Yes, I know it is a fast freight line, and that it is supposed to offer special facilities for freight.

Q. Do you know over what lines its cars run?

33 A. Well, I am not positive; I believe that it runs over the lines of what is known as the Vanderbilt system.

Q. Do you know where its shops are located?

A. I believe it has repair shops at or near Buffalo.

Q. Well, do you know whether any of their cars are continuously and exclusively used without the State?

A. No, sir; I have no means at hand of ascertaining that.

Q. Then the statements which have been submitted to-day with relation to distribution of their assets, so far as it relates to car mileage, is based entirely upon the statements of some officer or agent of the Merchants' Despatch Transportation Company?

A. Yes, sir.

Q. Are any of these cars which you say were employed without the State, as shown in Exhibit 4, employed by the New York Central Railroad Company without the State?

A. To the best of my knowledge they are not.

Applicant requests that the comptroller grant an adjournment of the hearing of this matter for such reasonable time as may be necessary to enable it to produce evidence as to the amount or proportion of the capital of the Merchants' Despatch Transportation Company which is exclusively and continuously employed without the State of New York during the tax year in question and such other matters as the amount of capital stock invested otherwise than in cars located within the State of New York, whether such investments consist of real estate or personal property.

Adjournment is granted to a Monday afternoon or Friday morning on or before March 15th, notice of at least three days to be given to the comptroller before appearance.

34 EXHIBIT 1 FOR IDENTIFICATION.

EXHIBIT 1 (WITH EXCEPTIONS).

Distribution of Assets.

October 31st, 1901.

	In New York State.	Outside New York.	Total.
Cost of road	$140,766,967.40		$140,766,967.40
Passenger locomotives	1,862,772.67		
Freight "	7,522,745.00		
Passenger cars 84.54% in	4,891,315.28		
" " 15.46% out		$912,771.87	
Freight " 45.38% in	2,000,882.27		
" " 54.62% out		15,166,597.38	
Work "	368,291.86		
Passenger boats	106,393.50		
Freight "	1,611,403.57		45,203,173.40
Total road & equipment	$169,890,771.55	$16,079,369.25	$185,970,140.80
Advances for construction.			
New York & Harlem R. R	$5,783,521.16		
West Shore R. R.	84,283.67		
Gouverneur & Oswegatchie R. R.	23,351.50		
New York & Putnam R. R.	47,126.68		
Beech Creek R. R.	261,076.07		
Pine Creek railway	200,034.72		
Boston & Albany R. R. (E. Bost. Imp.)	238,665.77		6,638,039.57
	$6,638,039.57		$6,638,039.57
Stocks of other companies (A)	$9,302,649.81	$111,972,292.96	$121,274,942.77
Bonds of other companies	4,391,411.52		4,391,411.52
Temporary assets.			
Cash on hand	$5,185,755.33		$5,185,755.33
Loans	10,000.00		10,000.00
Traffic balances receivable	4,362,620.34		4,362,620.34
Miscellaneous bills	2,139,960.43		2,139,960.43
Bills receivable	216,980.66		216,980.66
	$11,915,316.76		$11,915,316.76
35 Ownership in other lines, real estate, etc.			
Real estate not used in operation of road	$1,491,283.84		$1,491,283.84
Property purchased from B. & A. R. R.	1,970,039.95		1,970,039.95
Hudson River Bridge Co	2,256,363.36		2,256,363.36
Genesee Falls R. R.	35,717.43		35,717.43
N. Y. C. Niagara River R. R.	28,100.00		28,100.00
Niagara Falls & La Salle R. R.	363.35		363.35
Buffalo, Thousand Island & Portland R. R	140,500.00		140,500.00
Buffalo, Erie Basin R. R.	4.55		4.55
Toronto, Ham. & Buffalo Ry.	38,129.94		38,129.94
Troy Union R. R.	5,965.00		5,965.00
Clearfield Bit. Coal corporation	394,895.11		394,895.11
McGee's connection		9,212.91	9,212.91
Albany gas house	22,210.53		22,210.53
	$6,383,573.06	9,212.91	$6,392,785.97

Bonds bought for account sinking fund	$1,506,905.68	.....	$1,506,905.68
Fuel and supplies	3,824,588.67	$100,000.00	3,924,588.67
Improvements and investments carried temporarily in suspense account	1,352,209.08	.....	1,352,209.08
	$215,205,465.70	$128,160,875.12	$343,366,340.82
	62.68%	37.32%	100%

Stocks of Other Companies.

		Outside State.
D. A. V. & P. 483/90.6 — out of the State of	$156,912.38	$83,651.96
M. D. Transportation Co. 89% do. of	2,597,400.36	2,311,686.00
Morris Run Coal Mining Co	.....	900,000.00
N. J. Junction R. R	.....	100,000.00
Pine Creek railway	.....	100.00
West Shore & Ontario Terminal Co	.....	2,900.00
Jersey City & Bayonne R. R	.....	13,500.00
N. J. Shore Line R. R	.....	31,000.00
Beech Creek R. R	.....	1,125.00
Lake Shore & Michigan Southern railway 1342.32/1413.44 — of	90,578,400.00	86,020,770.53
36 Michigan Central R. R	.....	19,336,445.00
Clearfield Bit. Coal corporation	.....	200.00
Penns. & Western R. R	.....	11,983.61
Chest. Creek R. R	.....	6,000.00
West Branch Coal Co	.....	25,000.00
Pittsburgh & Eastern R. R	.....	150,000.00
Chesapeake & Ohio Ry	.....	1,638,454.79
N. Y., N. H. & H. R. R. 1952.07/2008.08 — of	$1,050,000.00	1,020,713.07
Pittsfield & North Adams R. R	.....	72,200.00
Boston Terminal Company	.....	100,000.00
Chester & Becket R. R	.....	500.00
The Windsor Co	.....	563.00
Beech Creek Extension R. R	.....	145,500.00
Beech Creek Coal & Coke Co	.....	1,000.00
		$111,972,292.96
Total stocks of other companies		121,274,942.77
Less outside New York State		111,972,292.96
In New York State		$9,302,649.81

EXHIBIT 2 FOR IDENTIFICATION.

Distribution of Assets.

October 31st, 1901.

	In New York State.	Outside New York.	Total.
Cost of road	$140,766,967.40	.....	$140,766,967.40
Passenger locomotives	1,468,051.14	394,721.53	1,862,772.67
Freight "	5,928,675.33	1,594,069.67	7,522,745.00
Passenger cars	4,653,011.08	1,251,076.07	5,904,087.15
Freight "	21,883,550.71	5,883,928.94	27,767,479.65
Work "	290,250.82	78,041.04	368,291.86
Passenger boats	131,134.72	35,258.78	166,393.50
Freight "	1,269,947.16	341,456.41	1,611,403.57
Cost of equipment*.	$35,624,620 96	$9,578,552.44	$45,293,173.40

* Division of equipment as based upon road mileage, in New York State. 2,540.24 78.81%
Outside New York State. 682.97 21.19%
Total road mileage. 3,223.21 100%

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	In New York State.	Outside New York State.	Total.
Advances for construction (for detail see statement No. 1)	6,638,039.57	.....	6,638,039.57
Stocks of other companies (for detail see statement No. 1)	9,302,649.81	111,972,292.96	121,274,942.77
Bonds of other companies	4,391,411.52	.....	4,391,411.52
Temporary assets (for detail see statement No. 1)	11,915,316.76	.....	11,915,316.76
Ownership of other lines, real estate, etc. (for detail see statement No. 1)	6,382,573.06	9,212.91	6,392,785.97
Bonds bought for account sinking fund	1,506,905.68	.....	1,506,905.68
Fuel and supplies	3,824,588.67	100,000.00	3,924,588.67
Improvements and investments carried temporarily in suspense	1,352,209.08	.....	1,352,209.08
	$221,706,282.51 64.57%	$121,660,058.31 35.43%	$343,366.340.82 100%

EXHIBIT 3 FOR IDENTIFICATION.

Distribution of Assets.

October 31st, 1901.

	In New York State.	Outside New York State.	Total.
Cost of road	$140,766,967.40		$140,766,967.40
Passenger locomotives	1,862,772.67		
Freight	7,522,745.00		
Passenger cars	5,904,087.15		
Freight cars	18,865,225.67	$8,902,253.98	
Work cars	368,291.86		
Passenger boats	166,393.50		
Freight boats	1,611,403.57		45,203,173.40
Cost of equipment*	36,300,919.42	8,902,253.98	45,203,173.40

* Division of freight equipment based upon mileage of freight cars outside of New York State on roads other than Vanderbilt lines compared with total freight-car mileage both in and out of State.

Mileage of freight cars in New York State and out of State but on Vanderbilt lines	360,624,454	67.94%
Mileage of freight cars outside of New York State on roads other than Vanderbilt lines	170,145,549	32.06%
Total freight-car mileage	530,770,003	100%

38	In New York State.	Outside New York State.	Total.
Advance for construction (for detail see statement No. 1)	6,638,039.57		6,638,039.57
Stocks of other companies (for detail see statement No. 1)	9,302,649.81	111,972,292.96	121,274,942.77
Bonds of other companies	4,391,411.52		4,391,411.52
Temporary assets (for detail see statement No. 1)	11,915,316.76		11,915,316.76
Ownership of other lines, real estate, etc. (for detail see statement No. 1)	6,383,573.06	9,212.91	6,392.785.97
Bonds bought for account, sinking fund	1,506,905.68		1,506,905.68
Fuel and supplies	3,824,588.67	100,000.00	3,924,588.67
Improvements and investments carried temporarily in suspense	1,352,209.08		1,352,209.08
	$222,382,580.98	$120,983,759.85	$343,366,340.82
	64.77%	35.23%	100%

Report of the New York Central & Hudson River Railroad Company for the Year Ending the Thirty-first Day of October, A. D. 1901, Made Pursuant to Provisions of § 182, Chap. 908, Laws of 1896. (Give post-office address of company, street and No.)

GRAND CENTRAL STATION, Dec. 1, 1901.

To the comptroller of the State of New York:

Agreeably to law, as treasurer of the above company, I make the following report, viz:

1. This company began business in the State of New York, in the month of November, 1869.

2. The last report made by this company to the comptroller of the State of New York under the provisions of the above act was made for the year ending October 31st, 1900.

3. Value of real estate and of interest or interests in real property in New York State, and where situated. Cannot give.

4. Organized under the laws of the State of New York.

5. Date of organization of the company, November 1, 1869.

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6. Total authorized capital of company...	$115,000,000.00
7. Whole number of shares of stock authorized.....	1,150,000
8. Number of shares of stock issued.....	1,150,000
9. Par value of each share.....	$100.00
10. Amount paid into the treasury of the company on each share. (See answers to Nos. 8 and 9.)	
11. *a*. Amount of capital paid in cash or property.....	See answers to Nos. 8 & 9.
b. Amount of capital paid in good will...	
c. Amount of capital paid in patents or copyrights.....	
12. Amount of capital upon which dividends were declared.....	$115,000,000.00
13. Date of each dividend paid, Jan. 15, April 15, July 15, and Oct. 15, 1901.	
14. Amount of each dividend declared.....	1,437,500.00
15. Rate per cent. per annum of dividends—five per cent. (5 %).	
16. The business transacted by this company in the State of New York for the year ending October 31, 1901, was as follows: (Give nature of business and how carried on.) Transportation.	
17. And such business was carried on at the following-named place or places: (Give street and number). Very numerous places.	
18. Capital stock employed in New York State...	71,806,000.00
(Preceding line need not be filled out by companies whose capital is all employed in this State.)	

40 19. If not in New York State, where and how employed? Property permanently employed and invested outside of the State.

20. Highest price of sales of stock during the year aforesaid, 170.

21. Lowest price of sales of stock during the year aforesaid, 127½.

G. S. PRINCE, Treasurer.

STATE OF NEW YORK, County of New York, } ss.:

On this 14th day of December, A. D. 1901, personally appeared before me a notary public in and for the county of New York, Geo. S. Prince, treasurer of the above-named company, who, being duly sworn according to law, did depose and say that the foregoing report is just, true and correct according as the accounts stand in the books of the company, and that includes all dividends, whether cash, stock, scrip, or of any other character or description, declared by said company during the year ending on the thirty-first day of October, A. D. 190–.

G. S. PRINCE, Treasurer.

Sworn to and subscribed before me the day and year aforesaid.

LOUIS BENDER,
Notary Public, 218, N. Y. County.

Remarks.

The capital stock employed outside of New York State has been determined by taking such proportions thereof as the capital outside of the State bear- to the total capital of the company in and out of New York State, viz., 37.56/100 % of $115,000,000.00.

41 Recapitulation.

Distribution of Capital, October 31st, 1901.

	In N. Y. State.	Outside N. Y. State.	Total.
Cost of road and equipment	$169,890,771.55	$16,079,369.25	$185,970,140.80
Lessor companies	6,638,039.57	.....	6,638,039.57
Stocks of other companies	9,302,649.81	111,972,292.96	121,274,942.77
Bonds of other companies	4,391,411.52	.....	4,391,411.52
Cash and cash assets	12,043,303.79	939,774.38	12,983,078.17
Ownership in other lines, real estate, etc.	7,855,079.36	534,851.77	8,389,931.13
Fuel and supplies	3,824,588.67	100,000.00	3,924,588.67
Sinking fund	1,506,905.68	.....	1,506,905.68
	$215,452,749.95 (62.44%)	$129,626,288.36 (37.56%)	$345,079,038.31

The comptroller, deeming the evidence taken before him on February 19th, 1903, upon the questions submitted upon the remittitur with relation to the taxation of the capital stock of the New York Central and Hudson River Railroad Company, for the year ending October 31st, 1900, to be pertinent to the issues upon this hearing, has, in accordance with the agreement made upon such hearing, made such testimony a part of the record of this hearing.

Which said testimony is as follows:

F. H. MEEDER appeared, and being duly sworn, testified as follows:

By Mr. EMERY:

Mr. Meeder, you may state where you live, where, how employed, and in what capacity?

A. Live in South Orange, New Jersey; employed as chief clerk in the office of the auditor of the New York Central and Hudson River Railroad Company.

Q. At the Grand Central station in New York city?

A. Yes, sir.

42 Q. Had you to do with the making up of the computations and figures for the return of the capital employed by the company in this State for the year ending October 1st, 1900?

A. Yes, sir.

Q. And in that capacity were you and are you familiar with the manner and place of use and employment of the rolling stock and equipment of the company?

A. Yes, sir.

Statement offered in evidence.

Objected to by Mr. Merrill in the form in which it is as incompetent.

By COUNSEL: I would suggest that it be identified, and I ask the preliminary questions.

Mr. MERRILL: Objected to on the general ground that under the remittitur the comptroller is only authorized to take into consideration evidence which shows the value of the rolling stock of the New York Central and Hudson River Railroad Company which is continuously and permanently without the State of New York and not to consider any testimony with relation to wheelage basis or mileage basis.

Statement received and marked Exhibit A, for identification.

Q. Did you make up the computations and statements shown upon the paper Exhibit A for identification, or were they made under your supervision?

A. Yes, sir.

Q. And what have you to say as to the correctness or incorrectness of the statements and figures as therein contained?

A. I believe that the division of the valuation of the company's

equipment is a correct one, using the company's road mileage in and out of New York State as a basis.

Q. That is, do you or do you not mean the road mileage
43 operated by the New York Central and Hudson River Railroad Company directly?

A. I mean such mileage operated directly.

Exhibit A for identification offered in evidence.

Objected to by Mr. Merrill on the ground that it is not permissible and is incompetent under the remittitur.

By COUNSEL: I will state ground under which I deem it to be receivable, admissible and proper to be received, even though Mr. Merrill were technically and absolutely correct; that is, referring to the opinion which comes down with the remittitur, it shows substantially this state of affairs; the opinion shows that the view which the court has of the record as it stood was that the use of the company's rolling stock outside of the State, off of its own road, consisted merely of the accomplishment of the shipment upon which the company started the car to and upon their so-called Vanderbilt or New York Central lines, to wit—the Lake Shore, Michigan Central, the Big Four, popularly called, and thereupon the cars were forthwith or presently reloaded and returned to the New York Central Company upon its line. Now, upon that view the court conceived that these cars were to be regarded as stock employed within New York State within the meaning of the statute. Now, in that connection no showing was made of the fact that any part of the company's line was operated—mileage was outside of the State of New York—nor was there any showing in that case either one way or the other that this rolling stock went in these Vanderbilt lines and was held of it. In view of that condition of affairs we offer this in evidence to show what the actual state of affairs was.

44 By Mr. KELSEY:

Q. That is, to determine how much outside and how much in?

A. That is to be regarded how much employed outside of the State and how much inside the State and for that purpose we offer this paper showing division of equipment of the company, showing first the total valuation of the equipment of the company in its various classifications and then the proportion of that value divided as per road mileage operated by the company within and outside the State.

Mr. MERRILL: It is contended that under the order of the court the only thing that we can take into consideration is the cars which are actually and permanently and continuously without the State. They are to be accepted as property without the State and otherwise than that they are to be construed as within the State. There is no ground, I insist, under the remittitur for taking a wheelage basis which the court distinctly turned down in the case which it had before it; if there is no ground for taking wheelage basis there is sub-

stantially the same reason why a mileage basis should be accepted. The wording of the remittitur in relation to this is as follows—"In view of the fact that there is no express finding by the comptroller that none of the relator's rolling stock was used exclusively outside of the State, I think it advisable that the proceedings should be remitted to the comptroller, to the end that further evidence may be taken upon the subject in case it should be claimed that some portion of the relator's rolling stock was used continuously outside of the State, and if it should be found that such was the fact, the amount thereof should be deducted and the order of the ap-
45 pellate division and that of the comptroller should be modified accordingly, without costs to either party."

Now, Mr. Comptroller, I contend that under this remittitur the only evidence which the comptroller is authorized to take in this matter is such as is in harmony with and along the lines indicated in the words quoted; that is, such evidence that will show what the value was of the rolling stock of the New York Central and Hudson River Railroad Company, and that was used exclusively and continuously outside of the State of New York during the year in question.

By COUNSEL: My claim is that, viewing the remittitur in the line of the opinion, that this is what fairly tends to establish those facts regarding the words continuously out of the State in their reasonable and ordinary sense, and so we offer that for the purpose of showing that, in view of this road mileage being the proportion shown without the State, that that proportion of equipment is to be regarded as having its situs without the State and being continuously without the State within the fair meaning of the statute prescribing this tax.

Mr. MERRILL: It is contended further on the part of the comptroller that all the evidence was before the court, and the comptroller in the case decided by the court and concerning which this remittitur was handed down, showing the wheelage of these cars without the State and within the State, and it is contended that the mileage basis is no more just than the wheelage basis, and they wouldn't, either one of them, determine fairly what cars were exclusively and continuously without the State.

46 By COUNSEL: I submit statement of equipment for October 31st, 1900.

Exhibit A for identification is received as Exhibit A, conditionally, the comptroller reserving the right to exclude it as evidence.

Q. Now, Mr. Meeder, the same year for the mileage basis off the Vanderbilt lines?

Statement produced, offered in evidence and marked Exhibit B for identification.

Q. Now, Mr. Meeder, examine the paper marked Exhibit B for

identification, and state whether it was prepared and made up by you, or under your supervision and direction?

A. This statement was prepared under my direction and supervision.

Q. And what have you to state as to its correctness as to statements and computations?

A. I believe the computations as shown upon this exhibit to be correct.

Q. And the statements contained in it to which the computations refer?

A. Yes sir.

Statement offered in evidence.

Objected to on the ground that it is incompetent, irrelevant and immaterial, and cannot be entertained under the conditions of the remittitur.

By COUNSEL: I claim for this that it exhibits the proportion of the rolling stock of the company that was continuously employed both outside the State of New York and off the New York Central lines and the lines controlled by the New York Central.

Mr. MERRILL: I object to it on the ground that it doesn't show anything of that character, but shows the result of a computation which in result is how many miles of road cars were operated on outside of New York State and how many miles of road cars
47 are operated on in New York State, and how many cars during the year were on those two divisions of mileage.

By COUNSEL:

Q. Mr. Meeder, in this statement marked Exhibit B for indentification, Mr. Meeder, the terms Vanderbilt lines are used—please state to what roads those words have reference.

A. The Lake Shore and Michigan Southern railway, the Michigan Central railroad, Cleveland, Cincinnati, Chicago and St. Louis railway, Lake Erie & Western R. R., N. Y., Chicago & St. Louis R. R., Pittsburg and Lake Erie railroad, and such lines as are controlled through ownership by those that I have mentioned.

By COUNSEL: Now, I offer this in evidence for the purpose of going further than the remittitur would require, to wit, showing the proportion of this equipment continuously employed outside of the State, but further restricting it to such; the dividing between the equipment on the one hand used within the State or on the New York Central operated lines, whether in or out of the State or upon the Vanderbilt lines as the witness has just designated without, and upon the other hand the continuous employment and use of it upon lines entirely foreign to the New York Central Company. The last figures show the amount and proportion entirely off all these lines that I have named, as well as entirely outside of the State.

By Mr. MERRILL:

Q. Mr. Meeder, are you prepared to swear that any car or percentage of the cars and locomotives mentioned in that statement were continuously and also exclusively used without New York State?

48 A. No, sir, I am not prepared to swear to the number so employed, but, so far as locomotives are concerned, I think comparatively few were so employed without the State.

Q. Now, Mr. Meeder, the remittitur calls for two concurrent conditions—one that this rolling stock shall be continuously employed without the State and the other is that it shall be exclusively employed without the State owned by this corporation, and I say it is incumbent upon this corporation to show to the comptroller how much, if any, of that rolling stock is not only continuously but exclusively employed without the State, and that no other evidence is competent.

Same excluded; exception taken.

By COUNSEL: I have here a list of number of car movements, as they are termed—that is, a showing of the individual cars by their number as they pass back and forth from one company to another, which I desire to have identified.

Objected to by Mr. Merrill, on the ground that it is incompetent, immaterial and irrelevant; that it doesn't show that those cars were exclusively and continuously employed without the State. Received as Exhibit C for identification.

By COUNSEL:

Q. Examine the paper marked Exhibit C for identification, Mr. Meeder, and state whether it was prepared under your direction and supervision?

A. Yes, sir, it was so prepared.

Q. And what have you to say as to its being correctly transcribed from the records of the movements of the cars?

A. I believe it to be a correct transcript from the records.

Q. What it means is that freight car number 27941 passed

49 from the possession of one railroad company to another railroad and at the dates named and at the dates specified in the statement?

A. Yes, sir.

Same offered in evidence. I offer to show by this that car number 27941 went from the New York Central and Hudson River railroad to the Michigan Central railroad on June 12th, 1902; that it passed from the possession of the Michigan Central railroad to the Chicago, Rock Island and Pacific railroad on June 14th, 1902, and from that date on passed from hand to hand from one company to another at the dates shown until November 25th, 1902, when it was still in the hands of the Chicago, Rock Island and Pacific, during which, more than five months, it was never in the possession of the New York

Central and Hudson River Railroad Company or of any of the so-called Vanderbilt or New York Central lines.

Mr. MERRILL: We object to it on the ground that it does not satisfy the two concurrent conditions laid down in the remittitur, and furthermore, that the whole transaction transpired after the close of the taxing year ending October 31st, 1900.

Same excluded.

By COUNSEL:

Q. Having in mind, Mr. Meeder, the history of the movement of car number 27941, as shown in the Exhibit C for identification, to which your attention has been called, what have you to say as to whether that is or is not fairly illustrative of the movement of vast numbers of the freight cars of the New York Central and Hudson River Railroad Company during the year ending October
50 31st, 1900, as regards their movement on other than so-called Vanderbilt lines?

A. I believe that this illustration of the movement of car 27941, while showing dates subsequent to October 31st, 1900, is an illustration of what did occur within the year ending October 31st, 1900, as regards numerous individual cars belonging to the New York Central and Hudson River Railroad Company; that is to say, that the records of the car accountant would show the delivery of New York Central and Hudson River Railroad Company's cars to other lines outside of New York State, and that they were not returned to the line of the New York Central for a considerable period of time.

Q. And what have you to say, Mr. Meeder, as to whether or not the mileage of freight cars outside New York State on roads other than Vanderbilt lines, 176,511,181, and the per centum, 32.68, is based essentially and largely upon car movements within that year, of which those shown upon Exhibit C for identification is illustrative?

A. To the best of my knowledge and belief, this total is mainly made up of individual car movements, such as illustrated in the table for number 27941.

COUNSEL: I now offer Exhibit C for identification as Exhibit C.

Objected to by Mr. Merrill as immaterial, incompetent and irrelevant.

Excluded. Exception taken.

COUNSEL: In the light of this further evidence I now renew the offer of Exhibit B for identification, to be included as Exhibit B.

Same objection.

Excluded. Exception taken.

Mr. MERRILL: This Exhibit B for identification is also objected to, further, on the ground that it shows exactly the same
51 method of procedure that was before the court in relation to rolling stock before; that is to say, wheelage, and which was rejected by the court.

By COUNSEL: In response to that the applicant's contention is that the paper is not subject to the objection interposed, because it was not merely the wheelage basis that the court treated as objectionable, but the wheelage basis which it deemed to be involved in the mere shipment from the New York Central railroad proper to points on their lines known as Vanderbilt lines, and then reloading the car back from such so-called Vanderbilt lines to the New York Central, whereas this division of mileage entirely discards the thing that the court thus treated as objectionable. That is to say, we are here claiming as exempt the proportion used on other than Vanderbilt lines, which ground of exemption was not brought before the court at all, so it could not have been passed upon by them.

Mr. MERRILL:

Q. Mr. Meeder, isn't it a fact that during all the time that cars of the New York Central Railroad Company and which were in transit out of the State on other lines, that there were cars of other lines also in the hands of the New York Central Railroad Company in the State of New York?

COUNSEL: I object to that inquiry upon the ground that it is irrelevant, immaterial and incompetent, because we are taxable on our capital employed in the State and not on capital of other companies.

Mr. MERRILL: I think this is pertinent in showing that the New York Central railroad had in lieu of its own property outside of the State property of other companies and had in use their property as though it were its own.

Objection sustained.

52 Mr. MERRILL: Mr. Comptroller I want to state that the purpose of making this inquiry was to show that such a condition of affairs did exist.

Mr. MERRILL:

Q. Mr. Meeder, is it not a fact that on much of the mileage of the New York Central Railroad Company in New York State there was more cars employed per mile than there is upon the mileage of the roads located without the State, proportionately?

A. I am not prepared to answer that question positively from my own knowledge.

Q. Mr. Meeder, is it not a fact that upon a wheelage basis a car operated outside the State of New York would wheel many more miles upon the average than it would in doing business that was local to the State of New York?

A. Not necessarily.

Q. Isn't it a fact, whether it was necessarily so or not? For instance, a car loaded at New York city with a car-load of eggs to go to Chicago, even if that car were returned loaded immediately, would travel several times as many miles in going, from New York

to Chicago and back again outside of the State as it would within the State?

A. Not if it went by the Lake Shore road, for example; it would make about half the distance in New York State and half the distance out.

Q. Suppose the car went still further west, to St. Louis, then?

A. It would make a greater mileage outside of New York provided it returned to New York again.

Q. How did you get the averages in Exhibit B for identification—did you, as a matter of fact, get those by taking a certain number of freight cars, or was it made up generally from the general records of the company and not upon averages?

53 A. The total freight car mileage shown on Exhibit B, showing the miles run by cars both in and out of New York State, was obtained from the records of the car accountant; the mileage of freight cars outside of New York State on roads *rather* than the Vanderbilt lines was obtained from the same source; the per cent. which this latter figure bears to the former is 32.68; this percentage was applied to the total valuation of the freight cars and gave the results shown on Exhibit B as valuation outside of New York.

Q. Now, Mr. Meeder, is it not possible to determine from the records of the New York Central and Hudson River Railroad Company whether there were any cars which did not come into and were not employed by New York Central Railroad Company in New York State during the year in question?

A. If the records of the car accountant are preserved for that period I am of the opinion that it might be determined, but that it would incur a vast amount of labor.

Q. Mr. Meeder, does the New York Central and Hudson River Railroad Company, as a corporation, operate any of these so-called Vanderbilt lines without the State?

A. No, sir.

Q. Are not these corporations, all of them, the possessors of rolling stock of their own?

A. Yes, sir.

Q. Does not the rolling stock of these companies come into State as rolling stock of New York Central goes out of State?

A. Yes, sir; you mean in the same manner.

Q. Yes.

A. Yes.

Q. Mr. Meeder, do you know what the percentage of mileage would have been in this State if, in making the calculation which you made in Exhibit B for identification, you had taken as out of

54 the State the mileage of freight cars in and out of the State of the so-called Vanderbilt line?

A. You mean——

Q. As a matter of fact, if the Vanderbilt lines located without the State had been treated as other lines without the State are treated

in that computation, would not the percentage of mileage of freight cars in New York State have been very much larger?

A. If the mileage of the cars upon the Vanderbilt system, so called, were also considered as out of New York State upon Exhibit B for identification, the percentage of value of cars shown as in New York State would be much less.

Q. Now, what would be the result, taking the same basis of mileage of freight cars outside of New York State?

A. That would be much greater.

Q. Now, Mr. Meeder, in arriving at that conclusion you took into consideration the cars owned by the Lake Shore, Michigan Central and other so-called Vanderbilt lines which were located without the State, did you not?

A. No, sir.

Q. Would that be true absolutely of New York Central and Hudson River Railroad Company's cars?

A. This statement covers only cars owned by New York Central and Hudson River Railroad Company, and no other.

Q. Now, then, will you state for the comptroller what the value was of the locomotives and other rolling stock of the New York Central and Hudson River Railroad Company which was continuously and exclusively without the State of New York?

Objected to by Mr. Emery, because it is incompetent, irrelevant and immaterial, and is calling for the very conclusion that the comptroller is to reach by his determination of this case upon the evidence.

Objection overruled. Exception.

55 A. I cannot tell from any information I have of the equipment so employed continuously and exclusively outside of the State during the year except upon an average basis.

Q. Would not the records that tell you what the wheelage was also show whether such cars were in or without the State or not?

A. As I have already stated, the car accountant's records, if preserved, so far as cars are concerned, would probably show that information.

Q. Those records were in existence when you made up these tabulated statements, were they not?

A. They were, presumably.

Q. If they were not in existence how could you have made up these tabulated statements?

A. I am speaking now of the individual car records—records of mileage totals might be in existence whether individual car movement records were or not.

Mr. MERRILL: I think the comptroller will ask you to furnish a statement showing what cars and other rolling stock were continuously and exclusively without the State of New York during the year ending October 31st, 1900.

COUNSEL: Do you mean by that individual cars?

Mr. MERRILL: I mean that the comptroller wants an absolute statement, if it can be determined by the New York Central and Hudson River Railroad Company, as to what cars and other rolling stock it had continuously and exclusively without New York State.

Mr. KELSEY: Is it a fact that every car that the Central owns comes back?

COUNSEL: It comes back when we can get it back; to follow out each individual car would be practically a denial of justice to require any such thing.

56 By Mr. MERRILL:

Q. Mr. Meeder, do you know whether any of the cars are permanently and exclusively without the State?

A. I have before me a statement which shows the movement of car 14035, which went to the Lake Shore and Michigan Southern railway upon December 20th, 1901, and was continuously off the line of the New York Central until January 4th, 1903, a period of over one year.

Q. Now, Mr. Meeder, have you any way of ascertaining what portion of the rolling stock of the New York Central and Hudson River Railroad Company would be so located all that year, without the State of New York, or of making a fair approximation of it?

A. The labor of following the movement of each individual car would be very great; and I may state as an indication of what that labor means, the going through the records to pick out these individual cases which were picked out at random, consumed several days of laborious tracing through all the car accountant's books.

Q. Were there any other cars picked out except those which you have presented to-day?

A. None other than those which we have here to-day; the fairest approximation I believe to be the car mileage of wheelage basis which shows actual performance of equipment.

Q. Does that show the number continuously and exclusively without the State at all or have any relation to it, Mr. Meeder?

A. These figures do not indicate individual cars, but show simply the total of miles made by the cars.

Mr. KELSEY:

Q. This computation does not take as a basis any number of specific cars that were traced and found absent for any length of time?

57 A. No, sir; the mileage of cars in and out of the State is arrived at in the following method: We receive from other railroads records of the number of miles made by our cars upon other lines, but they don't give us the number of individual cars. Their reports to us will simply show—your cars made during the month so-and-so upon our line so many miles; that might be ten or it might be fifty cars. We assemble together all these miles made

upon other roads, and then divide that total between the miles made by cars on other roads in New York State and on other roads out of New York State.

By Mr. MERRILL:

Q. Are those cars supposed to be in the course of returning home when they are making that mileage—are they supposed to be?

A. No, sir. It is a notorious fact that many foreign roads—that is, foreign to the New York Central—would seize every available car of other lines they could get for the conduct of their own business, and in many instances that would account for equipment being off the line for any length of time. I may say in connection that the reports of mileage made by foreign roads to the New York Central, that since July 1st last this has been discontinued for what is known as the per diem system; the compensation for use of other than owned cars has been put in effect, and few roads now compute the mileage of cars other than their own.

By COUNSEL: I will now renew offer of this "Exhibit B" for identification, in the light of the cross-examination, and in support of such offer I suggest that it now appears that the evidence offered is the best evidence which the nature of the case, in any fair or reasonable view, demands.

Objected to by Mr. Merrill on the ground that it isn't the
58 evidence to establish the facts called for by the remittitur, and that the evidence submitted in no way shows what, if any, portion of the rolling stock of the New York Central and Hudson River Railroad Company is either continuously, exclusively, or both continuously and exclusively, without the State of New York.

Objection sustained. Exception taken.

Report of the New York Central & Hudson River Railroad Company for the year ending the thirty-first day of October, A. D. 1900, made pursuant to provisions of § 182, chap. 908, Laws of 1896. (Give post-office address of company, street and No.)

GRAND CENTRAL STATION, November 30, 1900.

To the comptroller of the State of New York:

Agreeably to law, as treasurer of the above company, I make the following report, viz:

1. This company began business in the State of New York in the month of November, 1869.

2. The last report made by this company to the comptroller of the State of New York under the provisions of the above act was made for the year ending October 31st, 1899.

3. Value of real estate and of interest or interests in real property in New York State, and where situated—Cannot give.

4. Organized under the laws of the State of New York.

5. Date of organization of the company—November 1, 1869.
59 6. Total authorized capital of company—$115,000,000.
7. Whole number of shares of stock authorized—1,150,000.
8. Number of shares of stock issued—1,150,000.
9. Par value of each share—$100.
10. Amount paid into the treasury of the company on each share—(See answers to Nos. 8 and 9).
11. *a*. Amount of capital paid in cash or property, $—.
b. Amount of capital paid in goodwill, $—.
c. Amount of capital paid in patents or copyrights, $—.
} See answers to Nos. 8 & 9.
12. Amount of capital upon which dividends were declared—
$100,000,000 before April 1, 1900.
$115,000,000 after " " "
13. Date of each dividend payable—Jan. 15, Ap'l 16, July 16, Oct. 16, 1900.
14. Amount of each dividend declared—
$1,250,000 Jan. and April.
$1,437,500 July and October.
15. Rate per cent. per annum of dividends—Five per cent.
16. The business transacted by this company in the State of New York for the year ending October 31st, 1900, was as follows, viz: (Give nature of business and how carried on)—Transportation.
17. And such business was carried on at the following named place or places: (Give street and number)—Very numerous places.
18. Capital stock employed in New York State—$60,370,000. (Preceding line need not be filled out prior to March by companies whose capital is all employed —— 31, 1900, in this State.)
60 19. If not in New York State, where and how employed—$69,425,500 from April 1, 1900.
20. Highest price of sales of stock during the year aforesaid—139⅝.
21. Lowest price of sales of stock during the year aforesaid—120.

G. S. PRINCE, Treasurer.

STATE OF NEW YORK, }
County of New York, } *ss*:

On this fifth day of December, A. D. 1900, personally appeared before me, a notary public in and for the county of New York, George S. Prince, treasurer of the above-named company, who, being duly sworn according to law, did depose and say, that the foregoing report is just, true and correct, according as the accounts stand in the books of the company, and that includes all dividends, whether cash, stock, script, or of any other character or description, declared by said company during the year ending on the thirty-first day of October, A. D. 1900.

G. S. PRINCE, Treasurer.

Sworn to and subscribed before me, the day and year aforesaid.
J. P. McMAHON,
Notary Public (39), N. Y. Co.

Remarks.

The capital stock employed outside of New York State has been determined by taking such proportion thereof as the assets outside of the State bear to the total assets of the company in and out of New York State, viz: $39^{63}/_{100}$% of $100,000,000 from Nov. 1, 1899, to March 31, 1900; and $39^{63}/_{100}$% of $115,000,000 from April 1, 1900, to October 31, 1900.

61 Distribution of Assets, October 31st, 1900.

	In New York State.	Outside of New York State.	Total assets.
Cost of road and equipment	$166,074,130.15	$15,230,186.06	$181,304,316.21
Hudson River bridges, Albany	1,905,878.36		1,905,878.36
Advances for lessor companies	5,715,997.91	944,293.07	6,660,290.98
Stocks of other companies	9,055,764.16	117,503,817.73	126,559,581.89
Bonds of other companies	4,080,411.52		4,080,411.52
Cash and cash assets	8,847,030.28	10,000.00	8,857,030.28
Ownership in other lines, real estate, etc.	3,717,033.57	521,785.07	4,238,818.64
Fuel and supplies	3,992,485.63	100,000.00	4,092,485.63
Sinking fund	1,198,843.18		1,198,843.18
	$204,587,574.76 (60 37/100%)	$134,310,081.93 (39 63/100%)	$338,897,656.69 (100%)

Lines Leased.

Beech Creek railroad.
Carthage & Adirondack Railway Company.
Carthage, Watertown & Sackets Harbor Railroad Company.
Dunkirk, Allegheny Valley & Pittsburg Railroad Company.
Fall Brook Railway Company.
Gouverneur & Oswegatchie Railroad Company.
Mohawk & Malone Railway Company.
New Jersey Junction Railroad Company.
New York & Harlem Railroad Company.
New York & Putnam Railroad Company.
Niagara Falls Branch Railroad Company.
Oswego & Rome Railroad Company.
Pine Creek Railway Company.
Rome, Waterton & Ogdensburg Railroad Company.
Spuyten Duyvil & Port Morris Railroad Company.
Syracuse, Geneva & Corning Railway Company.
Tivoli Hollow Railroad Company.
Troy & Greenbush Railroad Association.
Utica & Black River Railroad Company.
West Shore Railroad Company.

62 EXHIBIT A FOR IDENTIFICATION.

EXHIBIT A CONDITIONALLY.

Equipment, October 31st, 1900.

	In New York State.	Outside New York State.	Total.
Passenger locomotives	$1,566,172.89	$217,623.11	$1,783,796.00
Freight "	6,486,532.30	901,317.70	7,387,850.00
Passenger cars	4,643,650.64	645,245.30	5,288,895.94
Freight "	24,506,043.17	3,405,167.73	27,911,210.90
Work "	267,153.39	37,121.54	304,274.93
Passenger boats	94,845.95	13,179.05	108,025.00
Freight "	1,276,626.47	177,390.01	1,454,016.48
Cost of equipment	$38,841,024.81	$5,397,044.44	$44,238,069.25

Division of equipment based upon road mileage,		
In New York State	2,483.61	87.80%
Outside " " "	345.07	12.20%
Total road mileage	2,828.68	100%

EXHIBIT B FOR IDENTIFICATION.

Equipment, October 31st, 1900.

	In New York State.	Outside New York State.	Total.
Passenger locomotives	$1,783,796.00		
Freight "	7,387,850.00		
Passenger cars	5,288,895.94		
Freight cars	18,789,827.18	$9,121,383.72	
Work cars	304,274.93		
Passenger boats	108,025.00		
Freight boats	1,454,016.48		$44,238,069.25
	$35,116,685.53	$9,121,383.72	$44,238,069.25

Division of Freight Equipment Based upon Mileage of Freight Cars Outside of New York State on Roads Other Than Vanderbilt Lines Compared with Total Freight Car Mileage Both in and out of State.

Mileage of freight cars in New York State and out of State, but on Vanderbilt lines	363,563,540	67.32%
Mileage of freight cars outside New York State on roads other than Vanderbilt lines	176,511,181	32.68%
Total freight car mileage	540,074,721	100%

63 EXHIBIT 4 AND EXHIBIT C FOR IDENTIFICATION.

New York Central & Hudson River Railroad Co.

NEW YORK, Jan. 16th, 1903....190–.

DEAR SIR: Below please find movements of N Y C car number 41279 from C. H. EWINGS, Car Acc't.

From	Train.	Date.	Time.	To	L. or E.	Date.	Time.	Con.
N. Y. Central.....		4/19		Mich. Central.....		4/19		
Mich. Central		5/10		L. S. & M. S.....		5/10		
L. S. & M. S.....		6/6		Vandalia.....		6/6		
Vandalia		6/13		L. S. & M. S		6/13		
L. S. & M. S.....		6/24		Pere Marquette.....		6/24		
Pere Marquette....		7/16		Mich. Central		7/16		
Mich. Central		7/18		Pere Marquette.....		7/18		
Pere Marquette....		7/20		Mich. Central		7/20		
Mich. Central		9/21		Penn. Company		9/21		
Penn. Company ...		10/17		L. S. & M. S		10/17		
L. S. & M. S.		10/31		Pitts. & Lake Erie..		10/31		
P. & Lake Erie		12/8		Penn. R. R..... ..		12/8		
Penn. R. R		12/9		Penn. Company....		12/9		
Penn. Company ...		12/12		Erie		12/12		
Erie		12/17		Clev., Cinn., Chic. & St. L.		12/17		

New York Central & Hudson River Railroad Co.

NEW YORK, January 16th, 1903. 190–.

DEAR SIR: Below please find movements of N Y C car number 41038 from C. H. EWINGS, Car Acc't.

From	Train.	Date.	Time.	To	L. or E.	Date.	Time.	Con.
N. Y. Central.....		4/28		L. S. & M. S		4/28		
L. S. & M. S.....		5/8		Lake Erie & West..		5/8		
L. E. & Western ...		5/20		L. S. & M. S.....		5/20		
L. S. & M. S.....		6/2		Grand Trunk.....		6/2		
Grand Trunk		6/19		Mich. Central		6/19		
Mich. Central		7/26		Chic., Milw. & St. P.		7/26		
Chic., Milw. & St. P.		7/29		Mich. Central.....		7/29		
Mich. Central		8/26		Chic. Junction		8/26		
Chic. Junction.....		8/31		Mich. Central		8/31		
Mich. Central.....		10/10		Chic., Rock I. & Pac.		10/10		
C. R. I. & Pac.....		10/14		Missouri Pac.....		10/14		
Mo. Pac.....		10/20		C. R. I. & Pac.....		10/20		
C. R. I. & Pac.....		11/27		Chicago, Peoria & West.		11/27		
Chicago, Peoria & West.		11/29		Chic., R. I. & Pac...		11/29		
C. R. I. & Pac.....		12/1		Ind., Ill. & Iowa....		12/1		
I. I. & Iowa.....		12/2		N. Y., Chic. & St. L.		12/2		
N. Y. C. & St. L...		12/5		Lehigh Valley		12/5		
Cent. of N. J.....		1/2		Penn. Railroad		1/2		
Lehigh Valley.....		12/7		Cent. of New Jersey.		12/7		
Penn. R. R.....		1/9		Washington South..		1/9		

64 New York Central & Hudson River Railroad Co.

NEW YORK, Jan. 16th, 1903.

DEAR SIR: Below please find movement of N Y C car number 59578 from
C. H. EWINGS, Car Acc't.

From	Train.	Date.	Time.	To	L. or E.	Date.	Time.	Con.
N. Y. Central		4/2		L. S. & M. S		4/2		
L. S. & M. S		4/17		Lake Erie & West		4/17		
L. E. & Western		5/8		Cin., Ham. & Dayton		5/8		
Cin., Ham. & Dayton		5/20		L. S. & M. S		5/20		
L. S. & M. S		5/23		Mich. Central		5/23		
Mich. Central		6/4		Erie		6/4		
Erie		6/15		Mich. Central		6/15		
Mich. Central		8/20		Tor. Ham. & Buffalo		8/20		
Tor. Ham. & Buffalo		8/21		Mich. Central		8/21		
Mich. Central		9/15		Chic. & Alton		9/15		
Chic. & Alton		9/30		L. S. & M. S		9/30		
L. S. & M. S		10/12		Atch., Top. & S. Fe		10/12		
Atch., Top. & S. Fe		10/15		Ill. Northern		10/15		
Ill. Northern		10/19		Atch., Top. & S. Fe		10/19		
Atch., Top. & S. Fe		10/23		L. S. & M. S		10/23		
L. S. & M. S		10/31		Del. Lack. & Western		10/31		
Del., Lack. & Western		11/28		Mich. Central		11/28		
Mich. Central		12/26		L. S. & M. S		12/26		
L. S. & M. S		1/1		Penn. R. R		1/1		

New York Central & Hudson River Railroad Co.

NEW YORK, Jan. 16th, 1903.

DEAR SIR: Below please find movements of N Y C car number 63158 from
C. H. EWINGS, Car Acc't.

From	Train.	Date.	Time.	To	L. or E.	Date.	Time.	Con.
N. Y. Central		6/12		L. S. & M. S		6/12		
L. S. & M. S		7/11		Ohio Cent. lines		7/11		
Ohio Cen. lines		7/18		L. S. & M. S		7/18		
L. S. & M. S		8/18		Pere Marquette		8/18		
Pere Marquette		9/8		L. S. & M. S		9/8		
L. S. & M. S		9/18		Wabash		9/18		
Wabash		9/28		L. S. & M. S		9/28		
L. S. & M. S		10/2		Chic., Mil. & St. P		10/2		
Chic., Mil. & St. P		10/5		Union Pacific		10/5		
Union Pacific		10/11		Southern Pacific		10/11		

65 New York Central & Hudson River Railroad Co.

NEW YORK, Jan. 16th, 1903.

DEAR SIR: Below please find movements of N Y C car number 18236 from C. H. EWINGS, Car Acc't.

From	Train.	Date.	Time.	To	L. or E.	Date.	Time.	Con.
N. Y. Central.....		3/5		Mich. Central.....		3/5		
Mich. Central.....		3/6		Pere Marquette.. ...		3/6		
Pere Marquette.....		4/2		Mich. Central.....		4/2		
Mich. Central.....		4/10		Chic., Ind. & L'ville..		4/10		
Chic., Ind. & Lou...		5/3		Elgin, Jol. & Eastern.		5/8		
Elgin, Jol. & Eastern.		5/8		L. S. & M. S.....		5/8		
L. S. & M. S.....		5/13		Wheeling & L. Erie..		5/13		
Wheeling & L. Erie..		6/6		L. S. & M. S.....		6/6		
L. S. & M. S		6/9		Ill. Central.....		6/9		
Ill. Central.....		7/2		L. S. & M. S..... ..		7/2		
L. S. & M. S.....		8/21		Cin., Ham. & Dayton.		8/21		
Cin., Ham. & Dayton.		8/24		Louisvl. & N'shville.		8/24		
Louisvl. & N'shville.		9/24		Penn. Company.....		9/24		
Penn. Company.....		11/10		Lake Erie & Western.		11/10		
Lake Erie & Western.		11/25		Penn. Company.....		11/25		
Penn. Company.....		12/20		Clev., Cinn., Chic., & St. L.		12/20		

New York Central & Hudson River Railroad Co.

NEW YORK, Jan. 16th, 1903.

DEAR SIR: Below please find movements of N Y C car number 63123 from C. H. EWINGS, Car Acc't.

From	Train.	Date.	Time.	To	L. or E.	Date.	Time.	Con.
N. Y. Central.		6/15		L. S. & M. S.....		6/15		
L. S. & M. S.....		6/18		Penn. Railroad.....		6/18		
Penn. Railroad.....		6/22		L. S. & M. S..... ...		6/22		
L. S. & M. S.....		6/25		Baltimore & Ohio....		6/25		
Baltimore & Ohio...		7/17		L. S. & M. S.....		7/17		
L. S. & M. S.....		8/1		Penn. Company.....		8/1		
Penn. Company.....		8/6		L. S. & M. S.....		8/6		
L. S. & M. S.....		8/14		Wheeling & L. E....		8/14		
Wheeling & Lake E..		9/5		Mich. Cent....		9/5		
Mich. Central.....		9/19		Wis. Central.....		9/19		
Wis. Central.....		9/21		Mich. Central.....		9/21		
Mich. Central.		9/26		Chic. Ter. & Trans...		9/26		
Chic. Ter. & Trans...		10/7		Chicago Belt		10/7		
Chic. Belt.....		10/8		N. Y., Chic. & St. L..		10/8		
N. Y., Chic. & St. L...		10/10		L. S. & M. S.....		10/10		
L. S. & M. S.....		11/5		Chic., Bur. & Quin...		11/5		
Chic., Bur. & Quin...		11/20		Chic. Belt.....		11/20		
Chic. Belt.....		11/29		Mich. Central.		11/29		
Mich. Central.....		12/8		Detroit, Tol. & Mil...		12/8		
Detroit, Tol. & Mil...		12/21		Penn. Company.....		12/21		

66 New York Central & Hudson River Railroad Co.

NEW YORK, Jan. 16th, 1903.

DEAR SIR: Below please find movements of N Y C car number 63176 from C. H. EWINGS, Car Acc't.

From	Train.	Date.	Time.	To	L. or E.	Date.	Time.	Con.
N. Y. Central		2/11		L. S. & M. S.		2/11		
L. S. & M. S.		2/14		C., C., C. & St. L.		2/14		
C., C., C. & St. L.		2/17		Ohio Central lines		2/17		
Ohio Central lines		2/22		Chesapeake & Ohio		2/22		
Chesap. & Ohio		3/27		C., C., C. & St. L.		3/27		
C., C., C. & St. L.		3/29		Ill. Central		3/29		
Ill. Central		4/11		Chic. Ter. & Trans.		4/11		
Chic. Ter. & Trans.		4/12		Chic. Belt		4/12		
Chic. Belt		4/30		L. S. & M. S.		4/30		
L. S. & M. S.		5/16		Chic. Junction		5/16		
Chic. Junction		5/20		L. S. & M. S.		5/20		
L. S. & M. S.		5/24		Lehigh Valley		5/24		
Lehigh Valley		5/28		N. Y., N. H. & H.		5/28		
N.Y., N. H. & H.		5/29		Boston & Maine		5/29		
Boston & Maine		6/21		N. Y., N. H. & H.		6/21		
N.Y., N. H. & H.		7/6		Lehigh Valley		7/6		
Lehigh Valley		7/7		Ironton R. R		7/7		
Ironton R. R		7/8		Lehigh Valley		7/8		
Lehigh Valley		7/11		Mich. Central		7/11		
Mich. Central		9/12		Lehigh Valley		9/12		
Lehigh Valley		9/21		Norfolk & Western		9/21		
Norfolk & Western		10/31		C., C., C. & St. L.		10/31		
C., C., C. & St. L.		11/2		Grand Rap. & Ind.		11/2		
Grand Rap. & Ind.		11/15		Dul., S. Shore & Atl.		11/15		
Dul., S. Shore & Atl.		11/17		M., St. P. & S. Ste. M.		11/17		
M., St. P. & S. Ste. M.		11/29		Dul., S. Shore & Atl.		11/29		
Dul., S. Shore & Atl.		12/3		Grand Rap. & Ind.		12/3		
Grand Rap. & Ind.		12/18		Penn. Company		12/18		

67 New York Central & Hudson River Railroad Co.

NEW YORK, January 16th, '03.

DEAR SIR: Below please find movements of N Y C car number 64431 from C. H. EWINGS, Car Acc't.

From	Train.	Date.	Time.	To	L. or E.	Date.	Time.	Con.
N. Y. Central		6/27		L. S. & M. S.		6/27		
L. S. & M. S.		7/8		Chic., Ind. & Louis.		7/8		
Chic., Ind. & Louis.		7/14		Mich. Central		7/14		
Mich. Central		7/30		Det., Tol. & Mil.		7/30		
Det., Tol. & Mil.		8/5		L. S. & M. S.		8/5		
L. S. & M. S.		8/18		Penn. R. R.		8/18		
Penn. R. R.		9/7		N. Y., N. H. & H.		9/7		
N. Y., N. H. & H.		9/9		Boston & Maine		9/9		
Bost. & Maine		9/17		N. Y., N. H. & H.		9/17		
N. Y., N. H. & H.		9/19		Bost. & Maine		9/19		
Bost. & Maine.		9/24		N. Y., N. H. & H.		9/24		
N. Y., N. H. & H.		10/4		Penn. R. R.		10/4		
Penn. R. R.		10/22		Penn. Co.		10/22		

New York Central & Hudson River Railroad Co.

NEW YORK, February 9, 1903.

DEAR SIR: Below please find movements of N Y C car number 61834 from C. H. EWINGS, Car Acc't.

Movements.	Month.	Day.	Year.	L. or E.	Time.	Train.	Con.
Rec'd from							
From N. Y. C.....							
To L. S. & M. S.....	July	2	1902		M		
From "							
To Elgin, Joliet & Eastern.	"	6	"		M		
From " " " .							
To Chicago & No. Western.	"	8	"		M		
From " " " .							
To Union Pacific.....	"	10	"		M		
From " "							
To Southern Pacific.....	"	14	"		M		
From " "							
To Union Pacific	Aug.	8	"		M		
From " "							
To Southern Pacific.....	"	11	"		M		
Del'd to " "							
Rec'd to " "							
From Southern Pacific							
To Atch., Topeka & Santa Fe Coast Line	Dec.	17	"		M		
From " " "							
To Southern Pacific.....	"	18	"		M		

68 New York Central & Hudson River Railroad Co.

NEW YORK, February 9, 1903.

DEAR SIR: Below please find movements of N Y C car number 14035 from C. H. EWINGS, Car Acc't.

Movements.	Date. Month.	Day.	Year.	L. or E.	Time.	Train.	Con.
Rec'd from					M		
N. Y. C.					M		
To L. S. & M. S.	Dec.	20	1901		M		
From " "					M		
To Cleve. Cin. Chic. & St. L.	"	23	"		M		
From " " "					M		
To Norfolk & Western	"	28	"		M		
From " "					M		
To Cleve. Cin. Chic. & St. L.	Jan.	8	1902		M		
From " " "					M		
To Norfolk & Western	"	12	"		M		
From " "					M		
To Chesapeake & Ohio	"	14	"		M		
From " "					M		
To Southern	"	20	"		M		
Del'd to					M		
Rec'd from					M		
From Southern					M		
To Washington Southern	Feb.	20	"		M		
From " "					M		
To Southern	Mar.	15	"		M		
From "					M		
To Baltimore & Ohio	"	24	"		M		
From " "					M		
To Southern	Apr.	21	"		M		
From "					M		
To Baltimore & Ohio	July	9	"		M		
From " "					M		
To Southern	"	11	"		M		
From "					M		
To Washington Southern	Sept.	3	"		M		
Del'd to					M		
Rec'd from					M		
From Wash. Southern					M		
To Southern	Oct.	26	"		M		
From "					M		
To Chesapeake & Ohio	Nov.	7	"		M		
From " "					M		
To Penn. R. R.	Dec.	3	"		M		
From "					M		
To Chesapeake & Ohio	Jan.	4	1903		M		
From " "					M		
To					M		
From					M		
To					M		
From					M		
To					M		
Del'd to					M		

69 New York Central & Hudson River Railroad Co.

NEW YORK, February 9, 1903.

DEAR SIR: Below please find movements of N Y C car number 27941 from
C. H. EWINGS, Car Acc't.

Movements.	Date. Month.	Day.	Year.	L. or E.	Time.	Train.	Con.
Rec'd from					M		
From N. Y. C.					M		
To Mich. Central	June	12	1902		M		
From "					M		
To Chic. R. Island & Pac.	"	14	"		M		
From " "					M		
To Colo. Midland	"	18	"		M		
From " "					M		
To Rio Grande Western	"	20	"		M		
From " "					M		
To Southern Pacific	"	21	"		M		
From " "					M		
To Union Pacific	Aug.	8	"		M		
From " "					M		
To Southern Pacific	Sept.	16	"		M		
Del'd to							
Rec'd from					M		
From Southern Pacific					M		
To Union Pacific	Sept.	22	1902		M		
From " "					M		
To Rio Grande Western	"	23	"		M		
From " "					M		
To Colo. Midland	Oct.	7	"		M		
From " "					M		
To Denver & Rio Grande	"	31	"		M		
From " " "					M		
To Colo. Midland	Nov.	5	"		M		
From " "					M		
To Chic., R. Island & Pac.	"	25	"		M		
From " " "					M		
To					M		
Del'd to							

70 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of The New York Central and Hudson River Railroad Company, Relator,
against
NATHAN L. MILLER, as Comptroller of the State of New York, Respondent.

Stipulation under Sections 3301 and 1353 of the Code of Civil Procedure.

It is hereby stipulated, under section 3301 of the Code of Civil Procedure, that the foregoing are true copies of the petition for writ of certiorari, order of issuance of writ, writ, and return to writ and

certification thereof, as required by section 1353 of the Codes of Civil Procedure, is hereby waived.

Dated New York, October 28, 1903.

IRA A. PLACE,
Attorney for Relator.
JOHN CUNNEEN,
Attorney General, Attorney for Respondent.

71 Order of Appellate Division.

At a term of the appellate division of the supreme court of the State of New York, held in and for the third judicial department of said State, at the appellate division court room, in the city of Albany, commencing on the 10th day of November, 1903.

Present: Hon. Charles E. Parker, presiding justice. Walter Lloyd Smith, Emory A. Chase, Alden Chester, James H. Houghton, associate justices.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of The New York Central and Hudson River Railroad Company, Relator,
vs.
NATHAN L. MILLER, as Comptroller of the State of New York, Defendant.

This cause having been brought on for argument and having been heard upon the writ of certiorari and return and the papers upon which the writ was granted and having been argued by Ira A. Place, Esq., of counsel for the relator, by William H. Wood, Esq., deputy attorney general, of counsel for the defendant,

Now, on motion of John Cunneen, attorney general, attorney for the defendant,

72 It is ordered, that the determination of the comptroller be and the same hereby is unanimously confirmed, with fifty dollars costs and disbursements.

[L. S.] JOSEPH H. HOLLANDS, Clerk.

(A copy.) JOSEPH H. HOLLANDS, Clerk.

73 **Affidavit of No Opinion.**

In the Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of The New York Central and Hudson River Railroad Company, Appellant,
against
NATHAN L. MILLER, as Comptroller of the State of New York, Respondent.

STATE OF NEW YORK, County of New York, } ss.:

Thomas Emery, being duly sworn, deposes and says: That he is an attorney and counsellor at law in the office of Ira A. Place, attorney for the appellant in the above-entitled action; that he is familiar with the action and the proceedings taken therein, and that no written opinion was handed down by the appellate division of the supreme court, third department, except the opinion handed down in a similar proceeding for the year 1900.

THOMAS EMERY.

Sworn to before me this 18th day of December, 1903.
JOHN A. MATTISON,
Notary Public, N. Y. County.

74 Relator's Notice of Appeal to Court of Appeals.

Supreme Court, County of Albany.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of The New York Central and Hudson River Railroad Company, Relator,
against
NATHAN L. MILLER, as Comptroller of the State of New York, Respondent.
} Notice of Appeal to Court of Appeals. Proceeding for 1901.

SIRS: Please take notice that the relator in the above-entitled action hereby appeals to the court of appeals from the order of the appellate division of the supreme court, third department, entered herein in the office of the clerk of the county of Albany, on the 10th day of December, 1903, and from each and every part of said order.

Dated New York, December 14, 1903.

Yours, &c.,
IRA A. PLACE,
Attorney for Relator, Room 417, Grand Central Station,
Borough of Manhattan, New York City, N. Y.

To John Cunneen, Esq., attorney for respondent, capitol, Albany, N. Y., and clerk of the county of Albany, Albany, N. Y.

75 Stipulation.

In the Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of The New York Central and Hudson River Railroad Company, Appellant,
against
NATHAN L. MILLER, as Comptroller of the State of New York, Respondent.

Stipulation under Sections 3301 and 1353 of the Code of Civil Procedure. Proceedings for 1901.

It is hereby stipulated, under section 3301 of the Code of Civil Procedure, that the foregoing are true copies of the notice of appeal, the order appealed from and the papers upon which the court below acted in making said order, on file in the office of the clerk of Albany county, and certification thereof, as required by section 1353 of the Code of Civil Procedure, is hereby waived.

Dated borough of Manhattan, New York city, December 21, 1903.

IRA A. PLACE,
Attorney for Appellant.
JOHN CUNNEEN,
Attorney General, Attorney for Respondent.

76 Court of Appeals.

STATE OF NEW YORK, *ss*:

Pleas in the Court of Appeals, Held at the Capitol, in the City of Albany, on the 23rd Day of February, in the Year of Our Lord One Thousand Nine Hundred and Four, Before the Judges of said Court.

Witness, the Hon. Alton B. Parker, chief judge presiding.
W. H. SHANKLAND, Clerk.

Remittitur February 24th, 1904.

Albany Special Term, M'ch 12, 1904.

Read on motion and ordered filed in Albany county clerk's office.
JOHN FRANEY, Clerk.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* The New York Central and Hudson River Railroad Company, Appellant,
ag'st
NATHAN L. MILLER, as Comptroller, etc., Respondent.

Proceeding for 1901.

Be it remembered, that on the 28th day of December in the year of our Lord one thousand nine hundred and three The New York

Central and Hudson River Railroad Company, the appellant in this proceeding came here into the court of appeals, by Ira A. Place, its attorney, and filed in the said court a notice of appeal and re-
77 turn thereto from the order of the appellate division of the supreme court in and for the third judicial department. And Nathan L. Miller, as comptroller etc. the respondent in said proceeding, afterwards appeared in said court of appeals by John Cunneen, attorney general, his attorney. Which said notice of appeal and the return thereto filed as aforesaid, are hereunto annexed.

Whereupon, the said court of appeals having heard this cause argued by Mr. Ira A. Place of counsel for the appellant, and by Mr. John Cunneen of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the appellate division of the supreme court appealed from herein be, and the same hereby is affirmed with costs relator having contended herein that if the statute purported to authorize the tax here in question said statute was violative of the Constitution of the United States in the particular following. The court hold and adjudge that the statute (1) does not offend against the commerce clause (article 1 section 8) of the Federal Constitution (2) does not contravene the provisions of article 1 section 10 thereof forbidding impairment of the obligations of contracts (3) does not offend against the provisions of the fourteenth amendment thereof forbidding the State to deprive any person of property without due process of law.

And it was also further ordered, that the record aforesaid, and the proceedings in this court, be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, with costs etc. etc. as aforesaid.

And hereupon, as well the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by
78 them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, February 24th, 1904.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[SEAL.] W. H. SHANKLAND, Clerk.

STATE OF NEW YORK,
County of Albany, Clerk's Office, } ss:

I, John Franey, clerk of the said county, and also clerk of the supreme and county courts, being courts of record held therein, do hereby certify that I have compared the annexed copy remittitur with the original thereof, filed in this office on the 16th day of March, 1904, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 11th day of May, 1904.

[SEAL.] JOHN FRANEY, Clerk.

79 In the Court of Appeals of the State of New York.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* The New York Central and Hudson River Railroad Company, Appellant,
v.
NATHAN L. MILLER, as Comptroller of the State of New York, Respondent.
} Actions 1 and 2.

People *ex rel.* N. Y. C. & H. R. R. R. Co. *v.* Miller, 89 App. Div. 127, affirmed.

(Argued February 9, 1904; decided February 23, 1904.)

Appeals from orders of the appellate division of the supreme court in the third judicial department, entered December 10, 1903, which affirmed determinations of the defendant in imposing a tax upon the relator for the years 1900 and 1901 under section 182 of the tax law.

Ira A. Place and Thomas Emery for appellant.

John Cunneen, attorney-general (William H. Wood on the brief), for respondent.

Orders affirmed, with costs, on opinion in People *ex rel.* N. Y. C. & H. R. R. R. Co. *v.* Knight (173 N. Y. 255).

Concur: Parker, Ch. J., Haight, Martin, Vann and Cullen, JJ. Not sitting: Gray, J. Not voting: O'Brien, J.

80 [Endorsed:] In the court of appeals of the State of New York. The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, appellant, *v.* Nathan L. Miller, as comptroller of the State of New York, respondent. Memoranda opinion. Tax of 1901.

81 In the Court of Appeals of the State of New York.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* THE NEW York Central and Hudson River Railroad Company, Appellant and Respondent,

v.

ERASTUS C. KNIGHT, as Comptroller of the State of New York, Respondent and Appellant.

Cross-appeals from an order of the appellate division of the supreme court in the third judicial department, entered September 20, 1902, which modified and affirmed as modified a determination of the defendant assessing a franchise tax against the relator for the year ending October 31, 1900.

The facts, so far as material, are stated in the opinion.

Opinion of the court per HAIGHT, J.:

"I concur in the conclusions reached by O'Brien, J., except as to that part thereof which holds that the item of $15,230,186.06 is not taxable. The court below found that this item represented the rolling stock employed outside of the State, it 'being such proportion of all of relator's rolling stock as the mileage thereof without the State bears to the entire mileage of said rolling stock.' As I understand this finding it is to the effect that the rolling stock of the relator is used in this State and outside of the State; that is, cars are loaded at some point in the State, as for instance in the city of New York, and run over the relator's road to some other
82 point, say, the city of Buffalo. They then are transferred on to other roads and are run to points outside of the State where they are unloaded and then reloaded and returned to this State. The entire mileage includes that traveled in this State as well as that out of the State; this, with the distance traveled outside of the State and the total value of the stock, furnishes the proportion upon which the computation is made.

The question is as to whether this stock is taxable under the statute. The relator is a domestic corporation. It owns the rolling stock. It is used upon its lines of railroad in this State. True, the cars are transferred on to other roads and are run outside of the State for the purpose of facilitating the transportation of persons and freight without change of cars or of breaking bulk, but the use of the cars outside of the State is but temporary, for they are returned as soon as reloaded and are again used in the transportation of persons and property within this State. It seems to me, therefore, that, under a fair and reasonable construction of the statute this item should have been included as capital employed within this State.

Under the findings of the court below, as we understand them, the average amount of the relator's capital stock during the year was

$108,750,000; the average price was $129.8125, making the average cash value of the relator's capital stock for the year $141,171,093.75. The entire amount of the relator's total assets was $337,760,785.52, and the portion of such assets as used in this State $205,029,380.45, to which sum should be added the relator's rolling stock
$15,230,186.06, making the total assets used within the
83 State $220,259,566.51. The statement would thus be x: 141,171,093.75 : : 220,259,566.51 : 337,760,785.52. Under this statement x = $92,060,076.91, the amount to be assessed at one and one-half mills, which amounts to $138,090.11.

In view of the fact that there is no express finding by the comptroller that none of the relator's rolling stock was used exclusively outside of the State, I think it advisable that the proceedings should be remitted to the comptroller, to the end that further evidence may be taken upon that subject in case it should be claimed that some portion of the relator's rolling stock was used continuously outside of the State, and if it should be found that such was the fact, the amount thereof should be deducted and the order of the appellate division and that of the comptroller should be modified accordingly, without costs to either party."

Opinion per O'Brien, J.:

"This appeal presents a controversy between the relator and the State concerning the amount of the annual franchise tax for the year ending October 31, 1900. The statute prescribes that this tax must be computed upon the basis of the amount of the relator's capital stock employed within the State. The main contention of the learned counsel for the relator is that the computation should be made upon the stock so employed at its par and not its actual value, and, hence, the determination now here for review is erroneous since the computation was made upon the latter principle. The language of section 182 of the tax law would seem to support the relator's contention, but this court has recently held that this section must be
read with section 190, and when so read the basis for the tax
84 is the actual and not the par value of the stock. (People *ex rel.* N. Y. & E. R. Ferry Co. *v.* Roberts, 168 N. Y. 14.) In the present case it would, doubtless, be to the advantage of the relator to have the tax based upon the par value of the stock, since that value is much less than the actual value and the dividends are only five per cent., but in case of a corporation that had paid even a smaller dividend and whose stock was much below par it would be decidedly to its disadvantage. By reading the two sections together absurd and unequal results are avoided. The two sections are apparently conflicting. In such cases it is the duty of courts to reconcile contradictory or conflicting provisions when possible, and the case cited is a precise authority for the principle that the tax should be based upon the actual value. This permits the statute to operate in a way that is reasonable and just while the other view would render it even more confusing than it now is. Courts cannot always

follow logical reasons when dealing with a complicated statute constructed without much method or system in the arrangement of its different parts and lacking in clearness and precision of language.

Passing from this question of construction, there is nothing left of the controversy on either side save the proper application of the rule and the principles upon which the actual value of the relator's capital in this State is to be ascertained. With respect to this question it should be noted at the outset that the writ of certiorari was made returnable at the appellate division and the issues were there tried and heard upon the relator's petition, the writ and the return of the comptroller, including the papers attached thereto. The general and primary question that the court had before it for decision was one of fact, and that was the actual value of that
85 part of the relator's capital employed within this State, and upon that question the learned court made findings upon which its general conclusion is based. In the main we think these findings are correct. There is one item of property which the court found, as matter of fact, to be employed outside the State, which, nevertheless, it felt constrained for some reason that does not distinctly appear to include as part of the property or capital stock employed in this State. It may be that this is an inadvertence or oversight, but it will be referred to more fully hereafter. The learned court in stating the account excluded certain items of property which the learned attorney-general contended and still insists should be included, and the ground upon which they were excluded from the calculation was that they either represented property employed outside the State or did not in any legal sense constitute capital at all. A very brief reference to these items will show that the action of the court below was correct.

(1.) The relator held $90,578,400 of the stock of the Lake Shore and Michigan Southern Railway Company and $18,900,825 in the Michigan Central Railroad Company. This stock was part of the relator's capital or general assets. Both companies are foreign corporations, the former being partly within and partly without the State and the latter entirely without the State. This stock was purchased by the relator by the issue of bonds and the stock was pledged to a trust company as collateral security for the payment of the bonds. The relator being the owner of these stocks, they constituted part of its capital, but that part of its capital was not employed within this State, and so this court has held. (People *ex rel.* Edison El. L. Co. *v.* Campbell, 138 N. Y. 543; People *ex rel.* Edison El. L. Co. *v.*
86 Wemple, 148 N. Y. 690.) In the former case Judge Earl, speaking for this court, said: 'The stock which the relator took in companies organized outside of this State stood for so much of the relator's capital invested outside of the State. It took a portion of its capital, to wit, a portion of its patent rights, and employed it outside of the State to purchase those stocks. Its property in those corporations represented by its shares of stock was outside of this State and was in no sense employed

here. Those stocks had no *situs* here and were not taxable here under any system of taxation which has ever existed in this State.' In the case at bar the stock was purchased, not with patent rights, but with the bonds of the company sought to be taxed. The form of the consideration, however, can make no difference, and so long as that part of the relator's capital represented by the purchase was employed outside of the State it should not be included. Nor can it be important that the stock had for convenience been used as a security upon deposit as collateral for the bonds in a trust company located in this State.

(2.) The court below found that a certain portion of the relator's rolling stock, that is to say, its cars, both freight and passenger, was employed outside the State, the proportion being estimated on the mileage or wheelage basis at $15,230,186.06. The court excluded this item from the calculation on the authority of People *ex rel.* Lackawanna Transp't'n Co. *v.* Knight (75 App. Div. 164). It was there held that the term 'employed within this State,' used in section 182, did not mean simply the legal *situs* of the property, and this principle was decided in other cases. (People *ex rel.* Chicago Junction, etc., Co. *v.* Roberts, 154 N. Y. 1; People *ex rel.* Washington Mills Co. *v.* Roberts 8 App. Div. 201; affirmed on opinion below, 151 N. Y. 619.) It
87 is obvious that since the relator is a great interstate railroad traversing the continent that a large proportion, or at least some, of its rolling stock must be always employed outside of the State. It may be that the *situs* of all the relator's property is in the State of its creation, but, as already remarked, the question is not where the *situs* is, but where the property is employed. It may be that various States through which the relator's railroad is operated impose taxes upon such part of its property as upon the basis adopted here is found to be employed in these States respectively, so we think that the learned court below was correct in excluding this item from the estimate of the relator's property employed within this State. The relator is practically operating a continuous line of railroad from New York to Chicago and beyond. It not only owns nearly $110,000,000 of the stock of the western connecting roads, as shown by the record, but is operating these roads as western connections either under leases or traffic agreements. It is practically the owner of these roads just as it is the owner of the West Shore in this State. The operations of the Central do not stop at Buffalo, but extend beyond and through Canada and various Western States. It owns these western roads by practically as good a title as it owns the West Shore in this State, and, hence, as already observed, it is operating a continuous line of railroad from the Atlantic seaboard through various States of the West. The part of the line beyond the limits of this State is longer than that part from New York to Buffalo, and the local and through traffic is immense. Therefore, to contend that all the rolling stock of the relator is 'employed in this State' would seem to me to be an indefensible proposition. Certainly

some of it much necessarily be employed in other States.
88 It cannot all be employed at the eastern end of the line. If so, then the part of the rolling stock employed outside and inside of this State is a question of fact and the court below has found that a designated part of the rolling stock is employed without the State. This court has no power to interfere with that result unless it can say that there is absolutely no evidence in support of the finding. It cannot say that for the plain reason that, as appears from the record, there was evidence on that subject and no one claims otherwise. It has the power to say that, granting to the full extent the fact found as to the employment of part of the rolling stock out of this State, yet as matter of law, since the relator is a domestic corporation and the *situs* of all its personal property is here, all the rolling stock is employed in this State. But such a decision would seem to me to be not only plainly wrong in principle, but sharply opposed to many decisions of this court, some of which are cited above. The stock of the western railroads, amounting to nearly $110,000,000, and the coal and other personal property that we have just held is not employed in the State, is owned and held here in just the same sense as the rolling stock, and why this property is employed outside the State, and all the rolling stock within the State is not made very clear to me, and, therefore, I am in favor of accepting the finding of the trial court that a certain and designated part of the cars and engines of the relator are employed outside of the State.

(3.) The learned court below found that three other items of the relator's property, amounting in the aggregate to $1,236,871.17, was not capital at all, or at least was not employed in this State.
89 This general item was made up of the sum of $965,217.97 for 'anticipated dividends' on stock of other corporations which the relator owned. The dividends had not been declared, and were, therefore, a mere incident to the stock. It seems to be conceded by both parties that this item was properly excluded. The second item embraced in the general amount above stated was $171,653.20 for bills receivable. This sum appears to have been made up of expenditures by the relator on leased lines. No direct return is expected for these expenditures and the relator holds no obligation for reimbursement, although carried on the books as 'bills receivable,' and so the court below properly held that this item constituted no part of the relator's property within this State for the purposes of the franchise tax. The third item entering into the general sum above stated was $100,000 for coal and supplies without the State. It is hardly conceivable that all the coal which the relator uses in the operation of its railroad can be said to be employed within this State, and so this item was properly found to be property not employed in this State. There was no error in the decision of the court below excluding these three items from the calculation.

(4.) The relator owned $2,597,400 of the capital stock of the Mer-

chants Dispatch Transportation Company, a domestic corporation engaged in the transportation business. Eighty-nine per cent. of that amount, or $2,311,686, represented business of that company outside the State, and although these facts are found by the learned court below, it included the latter amount in its valuation of the relator's property employed within this State. Since the relator's holdings in this company were employed outside the State we think they should not be included in the calculation under the authori-
90 ties cited above. It is very difficult to see how a distinction was made between those items and the other items referred to which the learned court below excluded. It seems to have been assumed that since this stock was that of a domestic corporation it constituted a part of the relator's property employed in this State; but, as already observed, the legal *situs* of the property does not determine the question, and since the learned court below found that the transportation company that issued the stock employed the capital represented thereby outside the State it is difficult to understand how the relator, by the mere fact of its ownership of the stock, could employ the capital represented by it in this State. With respect to this item, we think that the decision of the learned court below should be corrected by the proper modification.

By a process of calculation which is not questioned here by either party, except as to the matters above referred to, the learned court below found, as stated in the opinion, that the amount of the relator's capital employed within this State upon which the tax should be computed was $90,151,825.98, but since that amount was the result of an error in including a portion of the stock of the transportation company employed without the State, namely, the sum of $2,311,686, the calculation and estimate should be corrected upon the principles adopted as to the other items, and this process which seems to have been finally adopted by the court below in the official report of the case, will give the following result: The percentage of its entire capital employed within the State during the year was .60702, or over sixty per cent. The average amount of its entire capital stock at par was $108,750,000, and the average share price was $129.8125, making the average value for the average amount of stock
91 $141,171,093.75, and the amount upon which the tax of one and one-half mills should be computed $85,694,383.18, and the amount of the tax $128,541.57. There is a material discrepancy between the amount upon which the tax is to be computed as stated in the opinion of the learned court below and that stated in the findings. In the former, as already observed, the amount stated as the basis of the tax is $90,151,825.98 and the tax $136,227.73, while the actual finding of the court is that the amount upon which the tax should have been and should be computed is $86,659,287.62, and the tax should have been and should be $129,988.93. The discrepancy may, no doubt, be accounted for by assuming that the court below, in making up the judgment did not follow the opinion. However that may be, it will be seen that the result expressed in the findings

below makes the tax somewhat larger than the result at which we have arrived. The opinion of the court below as found in the record differs materially from that contained in the official report of the case (75 App. Div. 169). In the latter the case seems to be decided upon the principles herein stated, the slight difference in results being due to an error in the figures.

The order of the appellate division should be modified accordingly, with costs to the relator in this court."

Parker, Ch. J., Bartlett, Martin and Cullen, JJ., concur with Haight, J.; O'Brien, J., reads for modification of order; Van, J., absent.

Ordered accordingly.

92 [Endorsed:] In the court of appeals of the State of New York. The People of the State of New York *ex rel.* The New York Central and Hudson River Railroad Company, app'l't & resp't, against Erastus C. Knight, as comptroller of the State of New York, resp't & app'l't. Opinion.

93 At a special term of the supreme court of the State of New York, held in and for the county of Albany, at the city hall in Albany, N. Y., on the 13th day of March, 1904.

Present: Hon. D. Cady Herrick, justice.

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* THE NEW York Central & Hudson River Railroad Company
vs.
NATHAN L. MILLER, as Comptroller of the State of New York.

The above entitled cause having been taken to the court of appeals from an order of the appellate division of the supreme court in the third department, entered and filed in the office of the clerk of said appellate division, in the city of Albany, N. Y., on December 10, 1903, which order affirmed the determination of the comptroller in auditing and stating the account of the relator for the State franchise tax based on the value of the capital stock of the relator employed in this State for the year ending October 31, 1901, amounting to $235,755.00, and adjudged that the defendant recover against the relator the sum of fifty dollars costs and disbursements, and said appeal having been taken from every part of said order and the said court of appeals having rendered judgment in the cause on the 23rd day of February, 1904, in all things affirming the judgment of said appellate division, further ordering that the record of said
94 cause and that the proceedings in the court of appeals be remitted to the supreme court, to be enforced according to law, and also further ordering that the defendant recover of the relator, The

New York Central & Hudson River Railroad Company, the costs of appeal to said court of appeals, now therefore, on reading and filing the said remittitur, and on motion of John Cunneen, attorney general, attorney for the defendant,

It is ordered and adjudged that the judgment of the court of appeals be and the same hereby is made the judgment of this court, and that the defendant recover of the said relator, The New York Central & Hudson River Railroad Company the costs and disbursements of this proceeding.

D. CADY HERRICK
Jus. Sup. Ct.

95 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* THE NEW York Central & Hudson River Railroad Company
vs.
NATHAN L. MILLER, as Comptroller of the State of New York.

An order in this action having been made by the appellate division of the supreme court, third department, which order was entered in the office of the clerk of said appellate division, in the city of Albany on December 10, 1903, affirming the determination of the comptroller, in auditing and stating the account of the relator for the State franchise tax for the year ending October 31, 1901, at the sum of $225,755.00, and adjudging that the defendant recover from the relator the sum of fifty dollars costs and disbursements, and an appeal having been taken by the relator from said order to the court of appeals, and the said court of appeals having rendered judgment in this cause on the 23d day of February, 1904, in all things affirming said order of the appellate division, and further ordering that the defendant recover from the relator the costs of appeal to said court of appeals, and further ordering that the record in said cause and proceeding in said court of appeals be remitted to the supreme court, to be enforced according to law, and the said court of appeals having ordered to be sent to this court its remittitur, by which it appears that the said court of appeals has affirmed said judgment of the appellate division in all things, with costs,
96 and has given judgment accordingly, and this court having by order entered herein on the 16th day of March, 1904, ordered that the said judgment of the court of appeals be made the judgment of this court, with costs and disbursements,

Now therefore, on motion of John Cunneen, attorney general, attorney for the defendant, it is adjudged that the judgment of said court of appeals be, and the same hereby is made the judgment of this court, and that the defendant have execution against the relator, The New York Central & Hudson River Railroad Company for the sum of $142.70 costs and disbursements.

JOHN FRANEY, Clerk.

97 [Endorsed:] New York supreme court. The People of the State of New York, upon the relation of the New York Central and Hudson River Railroad Company, against Nathan L. Miller, as comptroller of the State of New York. Order and judgment. Tax of 1901.

98 Petition for Writ of Error to the Supreme Court of the State of New York.

In the Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of the New York Central and Hudson River Railroad Company, Plaintiffs in Error,
against
NATHAN L. MILLER, as Comptroller of the State of New York, Defendant in Error.

To the honorable justices of the Supreme Court of the United States:

Come now the said petitioners The People of the State of New York upon the relation of the New York Central and Hudson River Railroad Company by their attorney, and as and by way of complaint of and against the said Nathan L. Miller, as comptroller of the State of New York, respondent, respectfully show to the court:

That the said relator, The New York Central and Hudson River Railroad Company, was during all of the times mentioned in the record herein and is a domestic corporation of the State of New York, organized under the laws of and domiciled within that State, engaged in the business of a common carrier of persons and property between points respectively within that State, and between points respectively within the respective States of New Jersey and Pennsylvania, and between points in either of the said re-
99 spective States and points in either of the others thereof, and between points in either of said States and points in other States and foreign countries, and between points in respective States other than the above, via and over routes extending through and over portions of one or more of the said respectively named States.

That by provision of the tax law of the State of New York, section 180, the tax or license fee of and for domestic corporation organization and existence is imposed, exacted and paid once for all at the threshold of the vesting of corporate power; section 182 thereof provides imposition of an annual franchise tax for and upon the exercise of domestic corporation franchises to be computed as therein provided upon the basis of the amount of corporate capital employed in said State within the tax year; and, section 184 thereof provides imposition of an additional annual franchise tax to be computed upon the basis of the amount of corporate gross earnings within the tax year.

That during the year ending October 31, 1901, for and in respect of which the tax here in question was imposed and exacted, the said relator carried on its said business of a common carrier of persons and property in and by the operation of engines, cars and trains upon and over its owned and leased lines of railroad and lines of railroad upon and over which it had trackage rights, respectively, within the State of New York, and upon and over leased lines of railroad and lines of railroad upon and over which it had trackage rights, respectively, within the respective States of New Jersey and Pennsylvania, upon all whereof it carried persons and property locally between points within the respective States wherein portions of its operated lines of railroad were situate, and between points in those respective States and points in other States.

100 That in and about the carrying on of said transportation business by the said relator large numbers of its cars, though composed of frequently and constantly changing individual cars, passed into or out of the said respective States of New York, New Jersey and Pennsylvania in such wise that at all times a large average number, to wit, many hundreds of the cars of said relator were continuously situate, employed and operated in the States of New Jersey and Pennsylvania, respectively, upon and over railroads there situate, and in so doing were thus operated in the right of and under authority of the franchises in that behalf granted by those respective States and subject unto the burdens imposed and regulations prescribed in and by the laws, rules and ordinances of the respective States, and political subdivisions thereof, wherein the said portion of road was situate and the said transportation service performed.

That the major part of the said relator's said transportation business consisted of such transportation by it upon and over portions of its said operated lines of road of so much of through carriage of persons and property starting or consigned from points outside of the respective States of New York, New Jersey and Pennsylvania and destined to points within said respective States, or *vice versa*, and persons and property starting or consigned from points respectively without either of said States, passing en route through some one or more thereof, and destined to points respectively without either thereof.

That inasmuch as the said transportation service thus performed and rendered by the said relator consisted of operations within the said States of New Jersey and Pennsylvania respectively, they consisted of and inhered in the exercise of franchises granted by

101 those States respectively to corporations created by and domiciled within the said States, respectively, which were thus exercised by relator under and in pursuance of contracts of and for leases of, and contracts of and for trackage rights upon and over, railroads there situate, together with the franchise to maintain and operate the same, granted, remised and accorded by the said corporations created by said respective States to the said relator, and exercised and enjoyed by the said relator in and under authority of

the rights of its respective lessors and under and in pursuance of and subject unto the burdens imposed and regulations prescribed by the said States of New Jersey and Pennsylvania respectively.

That in and by the exercise and performance of the functions thus employed by the said relator in the respective States of New Jersey and Pennsylvania the only such function which it thus exercised under authority of the State of New York was that of its corporate existence, the tax whereon or wherefor is no part of the tax here in question.

That the said franchises thus exercised by the said relator in the respective States of New Jersey and Pennsylvania in and about and in respect of the there operation of its trains and transportation of persons and property were solely those granted and accorded by and under authority of the said respective States wherein the said operations were carried on and conducted, and were altogether and only subject unto regulations prescribed and promulgated by authority of those respective States and by authority of the United States, and not at all by authority of the State of New York.

102 That if and so far as it was within the province and power of the State, as distinguished from the United States, to impose or exact burdens upon or to prescribe regulations for and concerning the exercise by relator of the said franchises of railroad maintenance, train operation and transportation of persons and property, the province and power thereof solely inhered in and pertained to the said respective States of New Jersey and Pennsylvania wherein the said respective railroad was situate and the said franchises were exercised, and not in or to the said State of New York.

That in and about the said relator's train operations and transportation of persons and property upon and over its said operated lines of railroad in the said respective States of New York, New Jersey and Pennsylvania, respectively, in obedience to the requirements of the laws of the United States respecting through transportation from one State to another of carload commodities without reloading or breaking of bulk, and otherwise in conformity with the methods generally observed and followed by common carrier railroad transportation companies within the United States, in the time last preceding and within the said tax year, large numbers of relator's cars of various kinds were from day to day transferred and delivered from relator, and its said operated lines of railroad, in the respective States of New York, New Jersey and Pennsylvania, to, and upon the railroads of and operated by, other common carrier railroad transportation companies foreign to and outside of the State of New York, whereby a large average number of relator's cars, consisting of more or less frequently changing individual cars, were continuously and at any and all times out of the State of New York, and out of the

103 possession, custody and use of the said relator, and in the meantime transferred and delivered, more or less frequently from one to another common carrier railroad transportation corporation, and by them employed outside of the State of New York in

and about their mutual and respective transportation business, foreign to and entirely dissociated from the business of the said relator, and in such wise as rendered it impossible for the said relator to know, be informed or make proof, what, if any, of the said cars, and the extent to which all or any thereof, were employed in transportation business solely within or domestic to any State, or in transportation business between or among the several States, or between the United States and countries or dominions foreign thereto.

That the capital of the said relator invested and employed in the average number of the cars of the relator in manner aforesaid absent from and employed outside of the State of New York in and during the franchise tax year ending October 31, 1901, was in excess of the sum of $16,079,369.25, which said sum stood in such relation to the meantime total capital of said relator that in and by inclusion thereof as subject unto the franchise tax to be computed upon the basis of relator's capital employed within the State of New York, the said franchise tax was augmented and enlarged in and by the sum of $12,015.93.

That the said comptroller of the State of New York in and about the imposition and laying of the said franchise tax upon and against the said relator to be computed upon the basis of the capital of the said relator employed within the State of New York during the said tax year, and the said respective courts in and about their respective final orders and judgments of affirmance of the said tax, imposed and sustained the same computed upon the basis of and in-
104 cluding all of the cars of the said relator, the large average numbers whereof were in manner aforesaid absent from and employed in State and interstate and foreign commerce outside of the State of New York.

And the said petitioners further respectfully show unto the court and complain that in the said record and proceedings had in the above entitled action, (taxes of A. D. 1901), and also in the rendition of the final order and judgment in the said cause, in the supreme court of the State of New York, sitting in Albany county, third judicial department, at the appellate division November term thereof, A. D. 1903, to wit: November 10, 1903, as also in the final order and judgment of the court of appeals of the State of New York, to which last mentioned court the said cause was appealed by said petitioners, being the highest court of law and equity in said State, and the highest such court in which a decision could be had in said cause, to wit; on February 23, A. D. 1904, affirming on appeal the said final order and judgment of the supreme court of the State of New York, in the said cause between the said The People of the State of New York upon the relation of The New York Central and Hudson River Railroad Company, petitioners and plaintiffs in error, and the said Nathan L. Miller, as comptroller of the State of New York, respondent, and defendant in error, in each which supreme court and court of appeals, was drawn in question the validity of a statute of said State, and the validity of an authority exercised by

the said comptroller under said State, on the grounds that (1) they constituted a burden upon and regulation of commerce among the several States as carried on and conducted by the said relator and were thus repugnant to the commerce clause article 1, section 8, of the Constitution of the United States; (2) they impair the
105 obligations of contracts of and with the said relator and were thus repugnant to article 1, section 10 of the Constitution of the United States; and (3) they deprive the said relator of its property and property rights without due process of law and were thus repugnant to the provisions of the fourteenth amendment of the Constitution of the United States; and the decision, final order and judgment of each thereof, the said supreme court and the said court of appeals, was in favor of such their validity; and that in and by and in pursuance of the said decision, final order and judgment of affirmance and order of mandate and remittitur of the said court of appeals of the State of New York, the record and proceedings in said cause were remitted to and now remain in the said supreme court of the State of New York before the justices thereof; and in pursuance thereof and of the statutes of the State of New York in such case made and provided, thereafter, to wit; on March 16, 1904, final order and judgment was rendered by and entered in the supreme court, in said cause, in obedience to and in conformity with the said decision, order, judgment and remittitur of the said court of appeals; in all whereof manifest error hath happened to the prejudice and damage of the said relator, The New York Central and Hudson River Railroad Company.

Wherefore, the said The People of the State of New York upon the relation of The New York Central and Hudson River Railroad Company, petitioners and plaintiffs in error, pray for the allowance of a writ of error, and for such other and further orders and process as may cause the record and proceedings aforesaid, with all things concerning the same, to be sent to the Supreme Court of the
106 United States, that upon final hearing hereof the said error be corrected, and such other and further proceeding be ordered and had as according to law should be done.

And your petitioners will ever pray.

Dated, July 25th, 1904.

IRA A. PLACE,
Attorney for Petitioners, Plaintiffs in Error, Room 417 Grand Central Station, Borough of Manhattan, New York City, N. Y.

THOMAS EMERY, Of Counsel.

STATE OF NEW YORK, }
County of New York, } ss.:

Edward L. Rossiter, being duly sworn, says, that he is an officer of The New York Central and Hudson River Railroad Company, the

petitioner herein, to wit, the treasurer thereof; that the foregoing petition is true to the best of his knowledge and belief.

E. L. ROSSITER.

Sworn to before me this 25th day of July, 1904.

JOHN A. MATTISON,
Notary Public, New York County.

Allowed this — day of July, 1904.

——— ———,
Chief Judge of the Court of Appeals of
the State of New York.

107 [Endorsed:] United States Supreme Court. The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, plaintiffs in error, against Nathan L. Miller, as comptroller of the State of New York, defendant in error. Petition for writ of error. Tax of 1901. Ira A. Place, attorney for plaintiffs in error, Grand Central station, borough of Manhattan, New York city, N. Y. To John Cunneen, Esq. att'y for def't in error Service of a copy of the within petition is hereby admitted this 3 day of Aug. 1904 John Cunneen att'y gen'l att'y for def't in error

108 Copy.

United States Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* THE NEW York Central and Hudson River Railroad Company, Appellant,
against
NATHAN L. MILLER, as Comptroller, etc., Respondent.

Know all men by these presents, that we, The People of the State of New York *ex rel.* The New York Central and Hudson River Railroad Company, as principal, and The National Surety Company having an office and principal place of business at # 346 Broadway, borough of Manhattan, city of New York, as surety, are held and firmly bound unto Nathan L. Miller, as comptroller etc., above-named, in the sum of five hundred ($500.) dollars to be paid to the said Nathan L. Miller, as comptroller, etc., his executors or administrators, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated the 22nd day of July, 1904.

Whereas, the above-named appellant has sued out a writ of error to the United States Supreme Court to reverse the judgment in the above entitled case by the supreme court of the State of New York.

Now, therefore, the condition of this obligation is such that if the

above-named appellant shall prosecute said writ to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
By W. H. NEWMAN, President.

Attest:
[L. S.] D. W. PARDEE, Secretary.

NATIONAL SURETY COMPANY,
By JOEL RATHBONE, Res. Vice-President.

Attest:
[L. S.] RICHARD J. MORIARTY,
Res. Ass't Secretary.

109 STATE OF NEW YORK, }
County of New York, } ss.:

On the 22d day of July in the year 1904, before me personally came W. H. Newman to me known who being by me duly sworn did depose and say that he resides in New York; that he is the president of the New York Central and Hudson River Railroad Company, the corporation described in and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by authority of the board of directors of said corporation, and that he signed his name thereto by like authority.

[L. S.] WILLIAM HUTCHINSON,
Notary Public, # 193, New York County.

110 Copy.

STATE OF NEW YORK, }
County of New York, } ss.:

On this 22nd day of July 1904, before me personally appeared Joel Rathbone res. vice president of the National Surety Company, with whom I am personally acquainted, who being by me duly sworn, said that he resides in the county of New York; that he is the res. vice president of the National Surety Company, the corporation described in and which executed the within instrument; that he knows the corporate seal of said company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the board of directors of said company, and that he signed said instrument as res. vice president of said company by like authority; and that the liabilities of said company do not exceed its assets, as ascertained in the manner provided in section 3, chapter

720 of New York Session Laws of 1893. And the said *Richard J. Moriarty* further said that he is acquainted with Richard J. Moriarty and knows him to be the res. ass't secretary of said company; that the signature of the said Richard J. Moriarty subscribed to the said instrument is in the genuine handwriting of the said Richard J. Moriarty and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said res. vice president.

BELLE F. JAIS,
Notary Public for the County of N. Y., No. 47.

Certificate filed in Kings, Westchester Richmond & Queens counties.

Copy of By-Law.

Be it remembered, that at a regular meeting of the board of directors of the National Surety Company, duly called and held on the 6th day of February, 1900, a quorum being present, the following by-law was adopted:

"ARTICLE XIII, SEC. 1. *Signatures Required.*—All bonds, recognizances, contracts of indemnity and other writings obligatory in the nature thereof, shall be signed by the president, the vice-president, the second vice-president, a resident vice-president, or an attorney in fact, and, except when signed by an attorney in fact, shall have the seal of the company affixed thereto, duly attested by the secretary, an assistant secretary or a resident assistant secretary. The vice-president, second vice-president and resident vice-presidents shall each have authority to sign such instruments whether the president be absent or incapacitated or not; and the assistant secretaries and resident assistant secretaries shall each have authority to seal and attest such instruments, whether the secretary be absent or incapacitated or not. All such instruments executed as herein provided shall be as binding upon the company as if the same were signed by the president, duly sealed and attested by the secretary."

STATE OF NEW YORK, }
County of New York, } ss:

I, Richard J. Moriarty res. ass't secretary of the National Surety Company, have compared the foregoing copy of by-law with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original by-law.

Given under my hand and seal of the company this 22nd day of July 1904.

[L. S.] RICHARD J. MORIARTY,
Res. Ass't Secretary.

111 [Endorsed:] This bond both as to form and sufficiency of surety approved this 28th day of July 1904 Alton B. Parker Ch. J. Approved as to sufficiency Aug. 3d 1904 John Cunneen att'y gen'l. S. T. C.

112 Assignment of Errors.

In the Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of the New York Central and Hudson River Railroad Company, Plaintiffs in Error,

against

NATHAN L. MILLER, as Comptroller of the State of New York, Defendant in Error.

To the honorable justices of the Supreme Court of the United States:

Come now the said petitioners, plaintiffs in error, and respectfully show to the court that there is in the said record and proceedings manifest error upon which they will rely in and for their prosecution of the writ of error in the above entitled cause, to wit:

I. That the said supreme court of the State of New York erred in rendering, and the said court of appeals of the State of New York erred in affirming the final order and judgment wherein and whereby the provisions of section 182 of the tax law of the State of New York, and the authority exercised thereunder by the comptroller of the State of New York, were held valid in and for franchise taxation of and upon the basis of the capital of the said relator invested and employed in the average number of its passenger, freight, mail, baggage and express cars in obedience to laws of the United
113 States and in due course of business delivered by relator to and employed and used by other common carrier railroad corporations outside of the State of New York in the through carriage of persons and property starting or consigned from the State of New York, New Jersey and Pennsylvania, respectively, and destined to other States, and *vice versa*, and in transportation of persons and property between points in respective States other than and over routes wholly outside of the State of New York, and that such franchise tax did not offend against the commerce clause, article 1, section 8 of the Constitution of the United States.

II. That the said courts, respectively, erred in holding and deciding the said statute valid authority of and for franchise taxation upon the basis of the capital of the said relator invested and employed in the average number of its passenger, freight, baggage, mail and express cars, which in obedience to requirements of the United States statutes, and in the due process of business were transferred and surrendered by said relator to the possession of and used successively and interchangeably by other common carrier railroad

corporations outside of the State of New York in the through carrying of persons and property between points in respective States other than New York State, and over routes outside of that State, all under authority of and in the exercise of franchises granted to them respectively by respective States other than the State of New York, and that franchise tax thus computed and imposed did not impair the obligations of the contracts, arising upon, inhering in and pertaining to the grant and use of the respective franchises whereunder the said cars of relator were thus operated and used outside of the State of New York by common carrier railroad corporations
114 foreign to said State of New York, and hence was not repugnant to article 1, section 10 of the Constitution of the United States.

III. That the said courts, respectively, erred in holding and deciding the said statute valid authority of and for franchise taxation upon the basis of the capital of the said relator invested and employed in the average number of its passenger, freight, baggage, mail and express cars, which in the course of transportation business and in obedience to the requirements of the United States statutes, were by the said relator delivered to corporations foreign to the State of New York, and by such foreign corporations employed and used upon railroads operated by them respectively, in respective States other than New York State in the through carrying of persons and property starting or consigned from points in New York, New Jersey or Pennsylvania, and destined to points outside of either thereof, and *vice versa*, and between points foreign to said several States via and over lines of railroad situate without the State of New York, all in the exercise of and under the authority of franchises granted by the respective States wherein the said operations were so carried on and conducted, and that such franchise tax did not impair the obligations of the contracts pertaining to such use of relator's cars by other corporations, and hence was not repugnant to article 1, section 10 of the Constitution of the United States.

IV. That the said courts, respectively, erred in holding and deciding the said statute valid authority of and for and the exercise thereunder of said authority the valid imposition of franchise taxation in and by the State of New York upon the basis of the
115 capital of relator invested and employed in the average number of its cars which, in obedience to the requirements of the statutes of the United States, were delivered by relator to transportation corporations foreign to the State of New York, and operated and used by them wholly within States other than New York State, under authority of, and in the exercise of franchises granted by such other States, respectively, to corporations created by them, and that the said statute and the said tax imposed under its authority, did not operate to deprive relator of its property or property rights without due process of law, and hence did not contravene the provisions of the fourteenth amendment to the Constitution of the United States.

V. That the said courts, respectively, erred in holding and deciding that franchise taxation prescribed by, and imposed by the said comptroller of the State of New York under the supposed authority of, said statute, upon the basis of relator's capital invested in the average number of its cars by it operated and used in the States of New Jersey and Pennsylvania, respectively, in the transportation of persons and property between points within either of the said respective States, and between points within and points without either thereof, and between points of starting or shipment and points of destination without via and over routes in part within the said respective States, all under authority of and in the exercise of franchises granted by those States, respectively, to corporations created thereby and domiciled therein, and by the latter leased to the said relator, did not burden or regulate interstate or foreign commerce, and hence did not offend against or contravene the provisions of the commerce clause, article 1, section 8 of the
116 Constitution of the United States; and did not impair the obligations of contracts arising upon or inhering such obedience to the commerce laws of the United States, and therein did not contravene article 1, section 10 of the Constitution of the United States.

VI. That the said courts, respectively, erred in holding and deciding the said statute valid authority of and for franchise taxation in and by the State of New York upon the basis of the capital of relator invested and employed in the average number of its cars operated and used by it in the States of New Jersey and Pennsylvania in the exercise of franchises granted by those States, respectively, and leased or remised by the grantees thereof to the said relator, and exercised by it in the carrying of commerce between points respectively within, and between points within and points without those respective States, and that therein and thereby the said statute did not impair the obligations of contracts pertaining to interstate and foreign commerce, and hence did not offend against the provisions of article 1, section 10 of the Constitution of the United States.

VII. That the said courts, respectively, erred in holding and deciding that franchise taxation imposed by the said comptroller of the State of New York under the supposed authority of said statute, upon the basis of the capital of said relator invested in the average number of its cars by it operated and used in the States of New Jersey and Pennsylvania, respectively, in the exercise of franchises granted by those States, respectively, to corporations created thereby and domiciled therein, and by them leased to relator and by it exercised in commerce local to said respective States, as also
117 in commerce between those respective States and other States, did not impair the obligations of the contracts inhering in, arising upon and pertaining to the grant and use of the franchises granted by the said respective States, within their domain, respect-

ively, and hence did not therein offend against the provisions of article 1, section 10 of the Constitution of the United States.

VIII. That the said courts, respectively, erred in holding and deciding the said statute valid authority of and for franchise taxation upon the basis of the capital of the said relator invested and employed in the average number of its cars used wholly outside of the State of New York, in the operation of railroads situate in other States, owned by corporations created by and domiciled within such other respective States, and leased to and operated by the said relator under authority of the franchises of its said respective lessors, granted to them by the said States, respectively, and that such franchise tax did not impair the obligations of the said contracts of lease, and hence was not therein repugnant to article 1, section 10 of the Constitution of the United States.

IX. That the said courts, respectively, erred in holding and deciding the said statute valid authority of and for and the exercise thereunder of said authority the valid imposition of franchise taxation upon the basis of the capital of the said relator invested and employed in the average number of its passenger, freight, baggage, mail and express cars employed and used by relator in the States of New Jersey and Pennsylvania, respectively, upon lines of railroad situate in and built and owned by corporations charte-d by and domiciled in said respective States, and leased by such corporations to and operated by the said relator, in the carrying of State
118 and interstate commerce under and subject unto the franchise granted and regulation prescribed by such respective State wherein the said road is situate, and that such franchise tax did not transcend the territory and power of the jurisdiction of the State of New York and of its said comptroller and did not deprive relator of its property or property rights without due process of law, and hence did not therein contravene the fourteenth amendment of the Constitution of the United States.

X. That the said courts, respectively, erred in holding and deciding the said statute of the State of New York to be valid authority for, and the said authority of the comptroller of the State of New York exercised thereunder to constitute valid imposition of, the said franchise tax imposed and computed upon the basis of the capital of the said relator invested and employed in the average number of its cars, which, having in obedience to the requirements of the laws of the United States passed out of the State of New York and out of the possession, custody and control of the said relator, were operated and used by railroad corporations created by other States upon their railroads there situate, under authority of franchises granted by such other States, respectively, in common carrier transportation local to said respective States and between those and other States, and that such franchise tax thus computed and imposed did not constitute a burden upon or regulation of commerce among the several States, and did not impair the obligations of the contracts under which in obedience to the laws of the United States the said

relator transferred and surrendered, and the said respective
119 foreign corporations in turn directly or remotely acquired possession and custody of and used the said cars of said relator, and did not impair the obligations of the contracts inhering in, arising upon and incident to the grant and use in such other States of the franchises granted by them, respectively, and did not derogate from the dignity of such other States or otherwise transcend the territory or power of the jurisdiction of the State of New York or of its said comptroller, and hence that the said franchise tax thus computed and imposed did not offend against and was not violative of or repugnant to either article 1, section 8, or article 1, section 10 or the fourteenth amendment of the Constitution of the United States.

XI. That the said courts, respectively, erred in holding and deciding the said statute of the State of New York to be valid authority for, and the said authority of the comptroller of the State of New York exercised thereunder to constitute valid imposition of the said franchise tax computed and imposed upon the basis of the capital of the said relator invested and employed in the average number of its cars operated and used in the States of New Jersey and Pennsylvania, respectively, upon lines of railroad situate therein, built, maintained and operated under authority of franchises granted by those respective States to corporations created thereby, and domiciled therein, and under leases or grants of trackage rights of railroad and accompanying franchise demised or let by the said owning corporations to the said relator, and thus operated and used in and about common carrier transportation local to the said States of New Jersey and Pennsylvania, respectively, and between those respective States and other States of the United States and dominions foreign
to the United States, and that such franchise tax thus com-
120 puted and imposed did not constitute a burden upon or regulation of commerce among the several States or foreign commerce, or commerce within and domestic to such respective State, and did not impair the obligations of the contracts inhering in, arising upon and incident to the grant and use in such respective States of New Jersey and Pennsylvania of the franchises granted by them respectively, or of the contracts of lease and agreements of and for trackage rights whereby and whereunder the said owning corporations granted, demised and let the said property and property rights and franchises to relator and relator thus operated in the said respective States under authority thereof and of said franchises, and did not derogate from the dignity of such respective State or thus or otherwise transcend the territory or power of the jurisdiction of the State of New York or of its said comptroller, and hence that the said franchise tax thus computed and imposed did not contravene or offend against and was not violative of or repugnant to either article 1, section 8, or article 1, section 10, or the fourteenth amendment of the Constitution of the United States.

XII. That the said courts, respectively, erred in so holding and deciding as therein and thereby to uphold and sustain the validity

of the said statutory provisions and of the authority of the said comptroller of the State of New York exercised thereunder in the said computation and imposition of the said franchise tax as not constituting a burden upon or regulation of commerce domestic to and within States other than the State of New York, as not constituting a burden upon or regulation of commerce among the several States or with foreign countries, as not impairing the obligations of contracts arising upon and pertaining to commerce within and domestic to States other than the State of New York, as not impairing the obligations of contracts arising upon or pertaining to commerce among the several States and with foreign countries, as not impairing the obligations of contracts arising upon and pertaining to the grant of franchises by and the exercise and use thereof within States other than the State of New York, as not derogatory — the dignity of a *stater* State, as not transcending the territory or power of the jurisdiction of the State of New York or of its said comptroller, and as not depriving the said relator of its property or property rights without due process of law, and hence denying to the said relator the relief, order and decree herein prayed for, and in rendering judgment against them for costs and disbursements in the said cause and proceeding.

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XIII. That the said courts, respectively, erred in holding and deciding in favor of the validity of the said statute of the State of New York, and the authority of the said comptroller of the State of New York by him exercised thereunder, and consequent thereupon that the said petitioners, plaintiffs in error, were disentitled to have and maintain their said cause and proceeding and to have the relief, order and decree therein and thereby prayed for.

XIV. That the said courts, respectively, erred in holding and deciding in favor of the validity of the said statute of the State of New York and of the said authority exercised thereunder, whereby the said franchise tax was in manner aforesaid computed and imposed, as not repugnant to the Constitution of the United States, and consequent thereupon denying to said relator the relief, order and decree prayed for in its complaint in said cause.

122

XV. That the said courts, respectively, erred in that their said respective final order and judgment were for and in favor of the said respondent, defendant in error, as comptroller of the State of New York, when the same should have been for and in favor of the said petitioners.

The said petitioners, plaintiffs in error, pray judgment that the said final order and judgment aforesaid be in all things reversed, set aside and held for naught, and the said relator may be restored to all things which it has lost by occasion thereof.

IRA A. PLACE,
Attorney for Plaintiffs in Error.

THOMAS EMERY, Of Counsel.

123 [Endorsed:] United States Supreme Court. The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, plaintiffs in error, against Nathan L. Miller, as comptroller of the State of New York, defendant in error. Assignment of errors. Tax of 1901. Ira A. Place, attorney for plaintiffs in error, Grand Central station, borough of Manhattan, New York city, N. Y. To John Cunneen, Esq., att'y for def't in error. Service of a copy of the within assignment of errors is hereby admitted this 3 day of Aug., 1904. John Cunneen, att'y gen'l, att'y for def't in error. S. T. C.

124 Citation.

UNITED STATES OF AMERICA, *ss*:

To Nathan L. Miller, as comptroller of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of New York for the county of Albany, wherein The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 28th day of July, in the year of our Lord one thousand nine hundred and four.

ALTON B. PARKER,
Chief Judge of the Court of Appeals of the
State of New York.

125 [Endorsed:] United States Supreme Court. The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, plaintiffs in error, against Nathan L. Miller, as comptroller of the State of New York, defendant in error. Citation. Tax of 1901. Ira A. Place, attorney for plaintiffs in error, Grand Central station, borough of Manhattan, New York city, N. Y. To John Cunneen, Esq., att'y for def't in error. Service of a copy of the within citation with notice of allowance is hereby admitted this 3 day of Aug. 1904. John Cunneen att'y gen'l att'y for def't in error.

126 Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of New York, possessors of the return and record in the action in which The People of the State of New York upon the relation of The New York Central and Hudson River Railroad Company are plaintiffs and Nathan L. Miller, as comptroller of the State of New York, is defendant, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea in the court of appeals of the State of New York, wherein final judgment upon return from the supreme court of the State of New York was rendered March 16, 1904, that being the highest court of law and equity of the said State in which a decision could be had in the suit or action between The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, plaintiffs in error, and Nathan L. Miller, as comptroller of the State of New York, defendant in error, and which had been remitted to said supreme court for execution and is now before you or some of you in said court; wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity, a manifest error hath happened to the

127 great damage of the said, The New York Central and Hudson River Railroad Company, as by its complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the said Supreme Court, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 2nd day of August, in the year of our Lord one thousand nine hundred and four.

W. S. DOOLITTLE,
Clerk of the United States Circuit Court
for the Northern District of New York,
By C. W. HIGGISON, Deputy.

[SEAL.]

Allowed by—
ALTON B. PARKER,
Chief Judge of the Court of Appeals
of the State of New York.

STATE OF NEW YORK, }
County of Albany, Clerk's Office, } *ss*:

I, John Franey, clerk of the said county, and also clerk of the supreme and county courts, being courts of record held therein, do hereby certify that I have compared the annexed copies of writ of error; citation: assignment of error: bond; petition for writ of error; order & judgment; opinion; memoranda of opinion and papers on appeal from order, with the originals thereof, filed in this office on the 3rd day of August, 1904, and that the same are correct transcripts therefrom, and of the whole of said originals.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 3rd day of August, 1904.

[Seal Albany County, July, 1847.]

JOHN FRANEY, Clerk.

128 [Endorsed:] United States Supreme Court. The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, plaintiffs in error, against Nathan L. Miller, as comptroller of the State of New York, defendant in error. Writ of error. Tax of 1901. Ira A. Place, attorney for plaintiffs in error, Grand Central station, borough of Manhattan, New York city, N. Y. To John Cunneen, Esq. att'y for def't in error Service of a copy of the within writ of error, with notice of allowance, is hereby admitted this 3 day of Aug. 1904 John Cunneen att'y gen'l att'y for def't in error. S. T. C.

Endorsed on cover: File No. 19,445. New York supreme court. Term No. 82. The People of the State of New York upon the relation of The New York Central & Hudson River Railroad Company, plaintiff in error, *vs.* Nathan L. Miller, as comptroller of the State of New York. Filed August 16, 1904. File No. 19,445.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 586.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

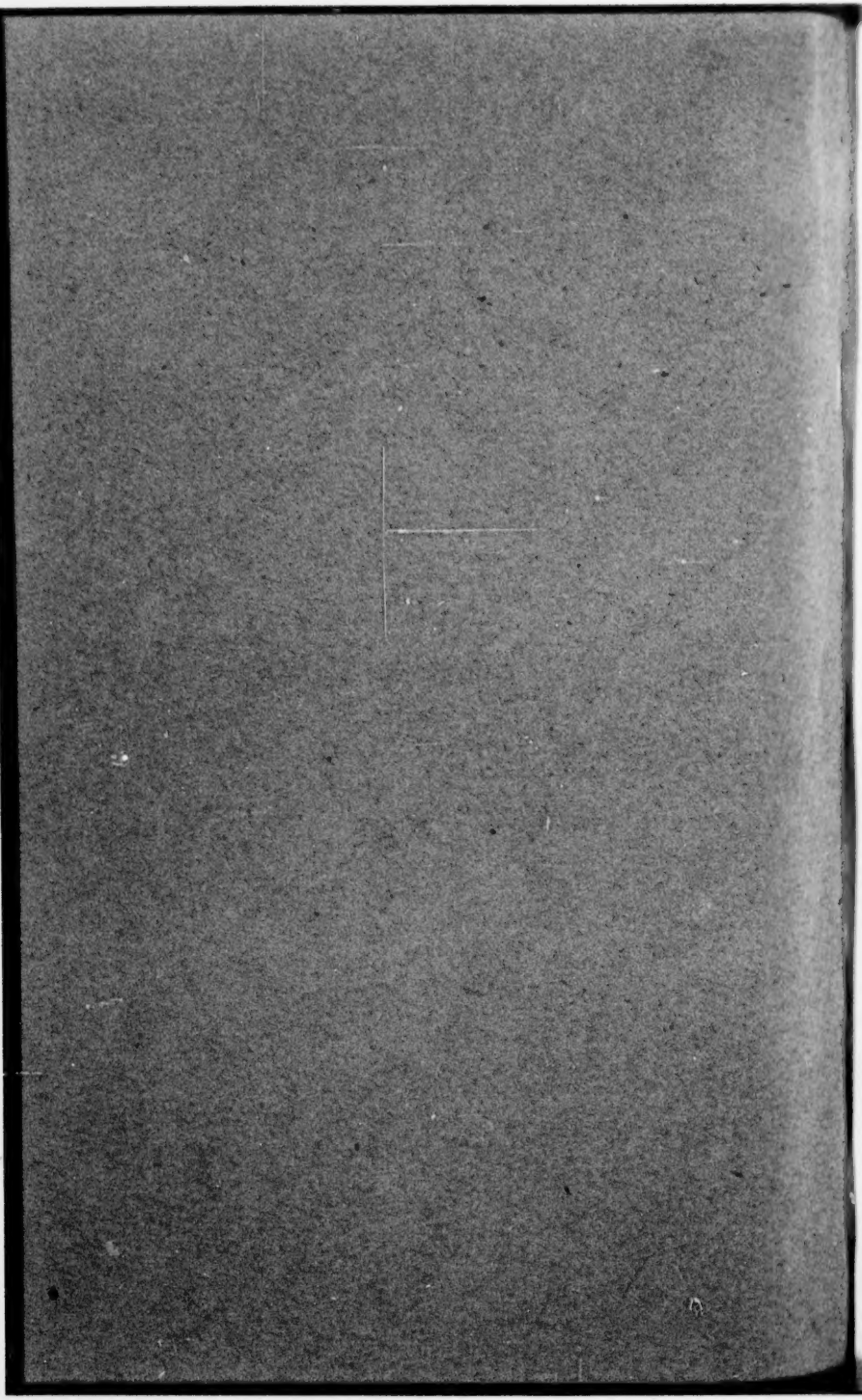
vs.

OTTO KELSEY, AS COMPTROLLER OF THE STATE OF NEW YORK.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

FILED FEBRUARY 7, 1906.

(20,668.)



(20,088.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 586.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

OTTO KELSEY, AS COMPTROLLER OF THE STATE OF NEW YORK.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

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a In the Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

against

OTTO KELSEY, as Comptroller of the State of New York.

Papers on Appeal from Order.

Proceedings for 1902.

Ira A. Place, Attorney for Appellant, Grand Central Station, Borough of Manhattan, N. Y. City, N. Y.
Julius M. Mayer, Attorney-General, Attorney for Respondent, Capitol, Albany, N. Y.

1 *Notice of Application for an Order for a Writ of Certiorari and for Writ.*

Supreme Court, Albany County.

Tax of 1902.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

against

OTTO KELSEY, as Comptroller of the State of New York.

SIR: Please take notice that a motion will be made by and on behalf of The New York Central and Hudson River Railroad Company, at a Special Term of the Supreme Court in and for the County of Albany, to be held at the City Hall in the City of Albany, N. Y., on the 30th day of September, 1905, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order for a writ of certiorari, and also for a writ of certiorari, to be directed to you, to review the determination of the Comptroller of the State of New York, dated September 11, 1905, a copy of
2 which is hereto annexed, to be returnable according to law, and for such other and further relief as may be proper.

Dated New York, September 18, 1905.

Yours, etc.,
IRA A. PLACE,
Attorney for Applicant, The New York Central and Hudson River Railroad Company.

Room 417, Grand Central Station, Borough of Manhattan, New York City, N. Y.

To Hon. Otto Kelsey, Comptroller of the State of New York, Albany, N. Y.

3 STATE OF NEW YORK:

COMPTROLLER'S OFFICE,
ALBANY, Sept. 11th, 1905.

In the Matter of the Application of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY for a Revision of Taxes Assessed Against it, Under Chapter 908, Laws 1896, and the Acts Amendatory Thereof.

An application having been made by the above-named New York Central and Hudson River Railroad Company for a revision and resettlement of the taxes assessed and determined against it by the Comptroller of the State of New York, for the one year ending October 31, 1902, and the said Comptroller having heard the proofs offered on behalf of the said New York Central and Hudson River Railroad Company, in support of said application, and after due consideration thereof, the Comptroller does hereby determine that the amount of capital stock of the New York Central and Hudson River Railroad Company employed by the New York Central and Hudson River Railroad Company within this State for the year ending October 31, 1902, including the value of its tangible
4 assets, good will and franchises, was $136,199,837.52, and the assessment heretofore made against the said New York Central and Hudson River Railroad Company for the sum of two hundred nine thousand two hundred thirty-four and 23/100 dollars should be revised to the sum of two hundred four thousand two hundred ninety-nine and 76/100 dollars, which said sum of two hundred four thousand two hundred ninety-nine and 76/100 dollars is hereby determined as the amount which said New York Central and Hudson River Railroad Company was liable to pay under the provisions of Chapter 908, Laws of 1896, and the acts amendatory thereof for the one year ending October 31, 1902.

OTTO KELSEY, *Comptroller.*

5 ***Petition for Writ.***

Supreme Court, Albany County.

(Tax of 1902.)

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

against

OTTO KELSEY, as Comptroller of the State of New York.

To the Supreme Court of the State of New York:

The petition of The New York Central and Hudson River Railroad Company respectfully shows:

I. This petitioner, The New York Central and Hudson River Railroad Company, is a domestic railroad corporation, having but

one kind of capital stock, organized and existing under the Laws of the State of New York, for steam surface railroad purposes, and is engaged in operating certain railroads owned or leased in the State of New York and certain railroads leased in other States, and was such railroad corporation and thus engaged during the year ending October 31, 1902, and therein as a common carrier for hire transacting the business of the transportation of persons and property, and that thereby and therein a part of its capital was employed in this State, and that continuously during the said tax year a part of its capital was thus employed outside of and not employed within the State of New York.

6 II. The defendant, Otto Kelsey is and has been since November 12, 1903, the Comptroller of the State of New York.

III. That on or before November fifteenth, 1902, this petitioner duly made a written report to the Comptroller of the State of New York, as required by Subdivision 1, of Section 189 of the Tax Law of the State of New York, being Chapter 908 of the Laws of 1896 of the State of New York, a full and true copy of which said report is hereto annexed, marked Exhibit One, and made a part hereof.

IV. That the said report set forth and showed the condition of this petitioner at the close of its business on October 31st preceding, and stated the amount if its authorized capital stock to be $150,000,000, of which there was issued, paid up and outstanding from November 1, 1901, to April 30, 1902, $115,000,000, and from May 1, 1902, to October 31, 1902, $131,916,300, an average for the said tax year of $123,458,150, and that the average value of the said capital stock during the said tax year was $162.125 per share, thus showing that the value of its entire average amount of issued capital stock was $200,156,525.69 and no more; that the date of the payment of each dividend declared by it during the year ending with said 31st day of October was as follows: January 15th, April 15th, July 15th, October 15th, 1902; that the aggregate rate per centum of the said dividends was five per centum; that such dividends amounted to less than six per centum on the par value of the capital stock of this petitioner; that the entire amount of the capital or assets of such corporation, this petitioner, wheresoever em-

7 ployed in and during the said tax year amounted to the sum of $359,316,025.89 and no more, of which capital or assets the said report set forth that $230,167,861.92 was the amount employed by such corporation, this petitioner, within this state during the year ending said October 31, 1902, whereas in truth and in fact $227,856,175.92 and no more, was the amount thereof actually employed within this state during the said tax year; and the said report set forth and showed that the amount of the said capital and assets employed by such corporation, this petitioner, outside of the State of New York during such year was $129,148,163.97, whereas in truth and in fact $131,459,849.97 was the amount of said capital and assets actually employed outside of this state in and during such year, and that therefore from November 1, 1901, to October 31, 1902, both inclusive, as stated and shown by the said report, $128,214,-

708.63 was, whereas in truth and in fact $126,926,986.95 actually was the value of such portion of the capital stock of such corporation, this petitioner, as bears the same relation to the value of all thereof as the amount of its capital and assets employed within this state during the said tax year bears to the entire capital and assets of the corporation.

V. That subsequent to the said 15th day of November, 1902, the said Comptroller audited and stated the account for taxes to be paid by this petitioner under Section 182 of the Tax Law, and sent notice thereof to this petitioner.

VI. That the account so audited and stated was in words and figures following, to wit:

8 "COMPTROLLER'S OFFICE, ALBANY, N. Y.

THE NEW YORK CENTRAL AND HUDSON RIVER R. R. CO.

GRAND CENTRAL STA., N. Y. C.

John Carstensen, Compt., in account with the State of New York, Dr.

For Tax on Franchise or Business, based on Value of Capital Stock employed in New York State, per Chapter 908, Laws of 1896, and acts amendatory thereof, for the year ending October 31, 1902, as per report filed.

Appraised Value of Capital Stock.....	$139,489,484.63
Tax 1½ Mills.....	209,234.23"

VII. That on or about the 30th day of October, 1903, and within one year from the time that said account had been audited and stated, and notice thereof sent to this petitioner, this petitioner applied to the said Comptroller to revise and readjust the said account and to have said account resettled by striking therefrom, or by crediting to the account of this petitioner, the sum of $16,903.82; that the said application was made by written petition, duly verified on or about the 30th day of October, 1903, and entitled "In the Matter of the Application of The New York Central and Hudson River Railroad Company for a Revision and Readjustment of the Account heretofore audited and stated by the Comptroller of the State of New York for Taxes, under Section 182 of the Tax Law, for the year ending October 31, 1902;" that upon such application said Comptroller, on or about the 11th day of November, 1903, granted a rehearing and announced to and informed said petitioner that he would duly notify said petitioner of the time of and for such hearing.

9 That thereafter, and while the said application was still pending and awaiting the order of the said Comptroller for fixing the time of and for the hearing thereof, to wit, on or about the 9th day of March, 1905, the said corporation, this petitioner, upon leave of the said Comptroller, presented to and before the said

Comptroller and filed in his office an amended petition and application for revision and resettlement of the said tax, upon the grounds and in the particulars therein set forth, a full and true copy of which said amended petition and application is hereto attached, marked Exhibit Two, and by reference made a part hereof.

That thereafter, to wit, on or about the 28th day of March, 1905, the said Comptroller announced and informed said petitioner that as soon as he reasonably could he would fix a date upon which the said amended application could be heard, and subsequently, to wit, on May 27, 1905, fixed the 6th day of June, 1905, as the day upon which the petitioner might be heard upon such amended application; that on the said 6th day of June, 1905, this petitioner duly appeared by its counsel before the Honorable Clark H. Timerman, the Deputy Comptroller; representing the said Comptroller, and gave testimony in support of said application; that upon said hearing it appeared from the revised and corrected figures that the entire amount of the capital of said corporation, this petitioner, was of the value and sum of $359,316,025.89, of which the amount of $227,856,175.92 and no more constituted its capital employed within this State during said tax year, and $131,459,849.97 was the amount of its capital employed outside of this State during said tax year; that the movable equipment of the said petitioner during the said tax year included passenger, mail and express cars of the value of $5,900,640.90, of which 85.66 per cent., or $5,054,488.99 and no more was the average portion thereof employed within the State of New York, and 14.34 per cent., or $846,151.91, was the average portion thereof which was continuously and at all times during the said tax year employed outside of and not within the State of New York, and that said petitioner's movable equipment also included freight cars of the total value of $27,890,978.20, of which 43.35 per cent., or $12,090,739.05 and no more was the average portion of the said total freight car equipment which was during the said tax year employed within the State of New York, and that 56.65 per cent., or $15,800,239.15 was the average portion of petitioner's said total freight car equipment which was continuously and at all times during the said tax year employed outside of and not within the State of New York; that petitioner's said equipment and the capital invested therein, as and when in manner aforesaid used and employed outside of this State, whether by this petitioner or by other persons or corporations, were so used and employed solely and exclusively under the authority of and in the exercise of corporate franchises granted to corporations of its or their creation by the respective states and territories and foreign dominions within whose territorial jurisdiction the said use and employment were had and conducted and not in the use or exercise of any franchise granted by or taxable in the State of New York, and all in and about the rendering and performance of the common carrier service of the transportation of persons and commodities between points of shipment and points of destination, respectively, within individual states, territories and dominions other than the State of New York, and

between points of shipment within the State of New York
11 and points of destination in states and territories other than New York and in foreign dominions, and *vice versa*, and between points of shipment and points of destination and via routes altogether outside of the State of New York, and were thus used and employed in and about transportation local to individual states other than the State of New York and transportation constituting and pertaining to interstate commerce and foreign commerce all in such wise as did and does render it impossible for said petitioner to be informed or state the measure of such transportation employment constituting or pertaining to commerce local to any one or more individual states, or the measure thereof constituting or pertaining to interstate or foreign commerce, by means whereof to state or compute the amount of said assets or capital used or employed in either thereof, as distinguished or distinguishable from the other; and further that the average value of its capital stock during said tax year was $162,125 per share, showing the average value of its $123,458,150 of capital stock during said tax year to have been the sum of $200,156,525.69 and no more, of which $126,926,986.95 was such portion of the value of the capital stock of such corporation, this petitioner, as the amount of its capital employed within this State bore to the entire capital of said corporation; that thereafter the said Comptroller made his determination, and sent written notice of his determination upon the said application, to the applicant, this petitioner, the said determination being as follows:

12 "STATE OF NEW YORK, COMPTROLLER'S OFFICE,
ALBANY, *Sept. 11th*, 1905.

In the Matter of the Application of NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY for a Revision of Taxes Assessed against it under Chapter 908, Laws of 1896, and the Acts Amendatory Thereof.

An application having been made by the above-named New York Central & Hudson River Railroad Company for a revision and resettlement of the taxes assessed and determined against it by the Comptroller of the State of New York, for the one year ending Oct. 31, 1902, and the said Comptroller having heard the proofs offered on behalf of the said New York Central & Hudson River Railroad Company, in support of said application, and after due consideration thereof, the Comptroller does hereby determine that the amount of capital stock of the New York Central & Hudson River Railroad Company employed by the New York Central & Hudson River Railroad Company within this State for the year ending October 31, 1902, including the value of its tangible assets, good will and franchises, was $136,199,837.52, and the assessment heretofore
13 made against the said New York Central & Hudson River Railroad Company, for the sum of Two Hundred Nine Thousand Two Hundred Thirty-four & 23/100 dollars, should be revised to the sum of Two Hundred Four Thousand Two Hundred Ninety-nine 76/100 dollars; which said sum of Two Hundred Four

Thousand Two Hundred Ninety-nine & 76/100 dollars is hereby determined as the amount which said New York Central & Hudson River Railroad Company was liable to pay under the provisions of Chapter 908, Laws of 1896, and the acts amendatory thereof for the one year ending October 31, 1902.

OTTO KELSEY, *Comptroller.*"

VIII. That in and by his determination upon the said application and resettlement and readjustment of the said tax at and as of the sum of $204,299.76, the said Comptroller computed the same at one and one-half mills upon each dollar of a valuation of $136,199,837.52; that the said valuation of $136,199,837.52 bears the same relation and proportion to $200,156,525.69, the average value of the entire capital stock of such corporation, this petitioner, during said tax year, as the amount of $244,502,566.98 bears to $359,316,025.89, the amount of the entire capital of such corporation, this petitioner; that the said amount of $244,502,566.98 included and embraced entire the $16,646,391.06, the amount and value of the average portion of the rolling stock of said corporation, this petitioner, which was proven before the said Comptroller to have been continuously employed outside of this State during the said tax year; that this petitioner then insisted, and ever since has insisted and now insists, that the said tax of $204,299.76 upon the said $136,199,837.52 valuation of its said capital stock was er-
14 roneously and unlawfully assessed or imposed and payment thereof, could not and cannot be lawfully demanded, and that the average portion of the average value of the capital stock of such corporation, this petitioner, throughout the said year which bore the same relation to the average value of the entire capital stock as the amount of capital employed within this State bore to the entire capital of the corporation, was $126,926,986.95 and no more; and that upon that sum only could such taxes be levied or imposed at the rate of one and one-half mills, amounting to $190,390.48 and no more, and that there should be such resettlement of said account as would result in striking therefrom or crediting to the account of said petitioner any and all excess of that sum; and then insisted and has ever since insisted and now insists that such portion of the value of the capital stock of the said corporation, this petitioner, as bore the same relation to the total value of its entire capital stock during said tax year as the amount and value of the average portion of its rolling stock continuously employed outside of this State during said tax year, bore to its entire capital wheresoever employed, during said year, did not nor did any part thereof constitute any part of the amount of its capital stock employed within this State, and that no tax could be lawfully computed, assessed or imposed upon the basis of such said portion of its said capital stock; and that whatsoever sum of tax was computed, assessed or imposed upon the basis of such said portion of its said capital stock should be either stricken off or credited to the account of said corporation, this petitioner; that the basis of computation of the said tax as resettled and readjusted by the said Comptroller was as follows:

x:200,156,525.69: : 244,502,566.98: 359,316,025.89.

15 In this statement x=$136,199,837.52, and the tax thereon at 1½ mills is $204,299.76.

That the deduction from the said $244,502,566.98 of the $16,646,391.06, the amount and value of the average portion of the rolling stock of said corporation, this petitioner, proven before the said Comptroller to have been continuously employed outside of this State during the said tax year, shows $227,856,175.92 and no more, as being the amount and value of the capital of said corporation, this petitioner, employed within this State during said tax year; that thus corrected the statement is as follows:

x:200,156,525.69: : 227,856,175.92: 359,316,025.89.

In this statement x=$126,926,986.95, and the tax thereon at 1½ mills is $190,390.48, thus showing the said corporation, this petitioner, entitled to further resettlement of the tax by striking therefrom or crediting to this petitioner's account the further sum of $13,909.28.

IX. That taxation in and by the State of New York, for and upon and in respect of corporate creation, existence and capacity, for and during the designated term of corporate life, is by and under the law of the State of New York computed upon the basis of the amount of the authorized capital stock, and imposed, and paid, once for all, at the creation of the corporation, subject only to addition upon and in respect of subsequent increase of authorized capital stock.

That the tax here in question has relation to and is imposed in respect of the use and exercise of the corporate franchise granted by the State of New York, and as such, is at most, lawfully computable in respect of the use and exercise thereof within this State, and upon the basis of the value of that portion of the amount of peti-

16 tioner's issued capital stock which has been employed within this State during the respective tax year.

That if and in so far as the enactments under color of which this tax is imposed purport to authorize taxation for or upon or in respect of the aforesaid use or exercise of franchises foreign to the State of New York, or computed upon the basis of capital thus in manner aforesaid used and employed within the territorial jurisdiction of other states, territories or foreign dominions in the use and exercise of, and under the authority of franchises granted by them or by the United States to corporations created by them, respectively, the said enactments are beyond the power and prerogative of the State of New York to prescribe and enforce and are violative of and contravene the constitution laws and treaties of the United States in that they deprive petitioner of the equal protection of the laws; also, in that they constitute the taking of property without due process of law; also, in that they constitute a regulation of, interference with and a burden upon interstate commerce and foreign commerce; also, in that they impugn the dignity and sovereignty of the United States and of sister states and of foreign dominions; also, in that they impair the obligations of the contracts arising upon and inhering in the grant to and acceptance by the corporations the lessors and licensors of said petitioner of the franchises by it as lessee and li-

censee used and exercised in respective states, territories and dominions other than and foreign to the State of New York; also, in that they impair the obligations of the contracts of lease of trackage right and license respectively, under and by virtue of which petitioner uses and exercises in respective states and territories
17 other than the State of New York and in foreign dominions the franchises granted by them respectively to the lessors and licensors of said petitioner; also, in that they impair the obligations of the contracts, express and implied, under which petitioner is required to and does order, direct and permit or order, direct or permit its movable equipment to pass to and remain in the custody and subject to the control of other corporations and be by them controlled and used in and about the transportation of persons and property upon their roads in other states and territories and foreign dominions under authority of and in the use and exercise of franchises granted by them respectively; also, in that the said enactments, and the judgments of the officers and tribunals in and of the State of New York sustaining and administering them, in and by imposing and enacting payment to the State of New York of a franchise tax computed upon the basis of the capital of said petitioner employed within the territorial jurisdiction of other respective States, in the use and exercise of franchises granted by them, respectively, deny and refuse to give "to the public acts" of said other respective States, by and under which the said franchises are granted, and the use and exercise thereof authorized and regulated, the "full faith and credit" force and effect which the said public acts are entitled to have, and do have, in the respective States whose acts they are, by reasons whereof the said petitioner alleges that the said sum of $13,909.28, the purported tax of one and one-half mills upon $9,272,850.53 in excess of $126,926,986.95, the value of the amount of $78,289,583.32 the par value of its capital stock employed within the State of New York, is erroneously and unlawfully as-
18 sessed and imposed, and that payment thereof should not have been demanded, and could not and cannot be lawfully demanded, and is wholly and altogether without foundation or authority of law.

X. That heretofore this petitioner duly deposited with the Treasurer of the State of New York the full amount of the taxes, percentage, interest and other charges audited and stated in the said account, and duly filed an undertaking with the said Comptroller in an amount and with sureties approved by a Justice of the Supreme Court of the State of New York, to the effect that if the said writ is dismissed, or the said determination is confirmed, this petitioner will pay any and all charges and costs which may accrue against it in the prosecution of the writ, including costs of all appeals, a copy of such undertaking being hereto annexed, and marked "Exhibit Three."

XI. That your petitioner is aggrieved by the said determination of the said Comptroller. That no previous application for this writ has been made to any Court or Judge.

Wherefore, your petitioner, desiring to review both upon the law

and the facts said determination of the said Comptroller, upon such application made to him by your petitioner for a revision and resettlement of so much of the said account, assessment and tax hereinabove set forth as embraces and is upon and in respect of such part of and so much of the value of its capital stock as bears the same relation to all thereof as the value of the average amount of its rolling stock equipment in manner aforesaid continuously employed outside of the State of New York during the said tax
19 year ending October 31, 1902, bears to the total value of its entire capital wheresoever employed during the tax year, prays that a writ of certiorari may issue out of the Supreme Court of the State of New York, directed to the said Comptroller of the State of New York, commanding the said Comptroller to certify and return at the office of the Clerk of Albany County all and singular the evidence before him on such application, and all the papers and proofs upon the original statement of such account, and all the proceedings thereon and all his decisions and actions in the premises, with all the evidence, documents, reports, records and papers relating thereto in his possession or under his control, submitted to or considered by him, concerning the said account and the grounds for his refusal to revise and readjust the same, in and regarding the particulars hereinabove set forth, to the end that his said decisions and determinations may be reviewed and the said original and resettled account corrected and restated, and that this petitioner have such other and further relief as may be proper.

Dated New York, September 26th, 1905.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
By E. V. W. ROSSITER, *Vice-President.*

IRA A. PLACE,
Attorney for Petitioner, Grand Central Station, Borough of Manhattan, New York City, N. Y.

20 STATE OF NEW YORK, *County of New York, ss:*

Edward L. Rossiter, being duly sworn, says: That he is an officer of the New York Central and Hudson River Railroad Company, the petitioner above named, to wit, the treasurer thereof; that the foregoing petition is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

E. L. ROSSITER.

Sworn to before me this 26th day of September, 1905.

GEO. T. BROWN,
Notary Public, Westchester County.

Certificate filed in N. Y. County.

21 EXHIBIT ONE.

Report of the New York Central and Hudson River Railroad Company for the year ending October 31st, 1902, made pursuant to provisions of Sec. 182, Chapter 908, Laws of 1896, and acts amendatory thereof.

(Give post-office address of Company, Street and No.)

GRAND CENTRAL STATION, NEW YORK,
Dec. 15th, 1902.

To the Comptroller of the State of New York:

Agreeably to law, as Treasurer of the above Company, I make the following report, viz.:

1. This company began business in the State of New York in the month of November, 1869.
2. The last report made by this Company to the Comptroller of the State of New York under the provisions of the above act was made for the year ending October 31st, 1901.
3. Value of Real Estate and of interest or interests in real property in New York State, and where situated. Cannot give.
4. Organized under the laws of the State of New York.
5. Date of Organization of the Company, November 1st, 1869.
6. Total authorized Capital of Company (authorized by stockholders) $150,000,000.00
7. Whole number of shares of stock authorized (authorized by stockholders), 1,500,000.
8. Number of shares of stock issued, 1,319,163.
9. Par value of each share $100.00
10. Amount paid into the Treasury of the Company on each share $100.00

22. 11. *a.* Amount of Capital paid in cash or property $131,916,300.00
b. Amount of Capital paid in good will ..... $
c. Amount of Capital paid in patents or copywrights ..... $

12. Amount of Capital upon which dividends were declared $131,916,300.00
13. Date of each dividend paid, Jan. 15th, April 15th, July 15th, & Oct. 15th.
14. Amount of each dividend declared, Jan. 15th, $1,437,500.00; April 15th, $1,437,500.00; July 15th, $1,648,911.25; Oct. 15th, $1,648,953.75.
15. Rate per cent. per annum of dividends, 5%.
16. The business transacted by this Company in the State of New York for the year ending October 31st, 1902, was as follows, viz: (Give nature of business and how carried on.)
Transportation.

17. And such business was carried on at the following named place or places: (Give Street and number.)
Numerous places.
18. Capital stock employed in New York State, $79,087,290.89. (Preceding line need not be filled out by companies whose capital is all employed in this State.)
19. If not in New York State, where and how employed, permanently employed and invested outside of New York State.
20. What percentage of capital is employed in manufacturing in State of New York?
21. Highest price of sales of stock during the year aforesaid..174½.
22. Lowest price of sales of stock during the year aforesaid...149¾.

(Signed) E. L. ROSSITER, *Treasurer.*

23 STATE OF NEW YORK, *County of New York, ss:*

On this 15th day of December, A. D. 1902, personally appeared before me, a notary public in and for the County of New York, E. L. Rossiter, treasurer of the above-named company, who, being duly sworn according to law, did depose and say, that the foregoing report is just, true and correct according as the accounts stand in the books of the company, and that it includes all dividends, whether in cash, stock, scrip or of any other character or description, declared by said company during the year ending on the thirty-first day of October, A. D. 1902.

(Signed) E. L. ROSSITER, *Treasurer.*

Sworn to and subscribed before me the day and year aforesaid.
(Signed) LOUIS BENDER,
Notary Public, 218.

Remarks.

The capital stock employed outside of New York State has been determined by taking such proportion thereof as the capital outside of the State bears to the total capital of the company in and out of New York State.

Total capital stock November 1st, 1901, to April 30th, 1902	$115,000,000.00
Total capital stock May, 1st, 1902, to October 31st, 1902	$131,916,300.00
Total capital stock average for year	$123,458,150.00

24 *Recapitulation of Distribution of Assets.*

October 31, 1902.

	In State of New York.	Outside State of New York.	Total.
Cost of road and equipment.	$174,618,395.45	$16,646,391.06	$191,264,786.51
Lessor companies.....	6,044,757.71	2,283,128.03	8,327,885.74
Stocks of other companies....	16,499,270.65	109,669,172.12	126,168,442.77
Bonds of other companies.	3,924,495.24	.....	3,924,495.24
Cash and cash assets.....	18,075,356.97	.....	18,075,356.97
Ownership in other lines, real estate, etc.....	4,335,564.12	49,472.76	4,385,036.88
Fuel and supplies.....	4,657,530.96	500,000.00	5,157,530.96
Bonds bought for % sinking fund.....	1,807,636.93	.....	1,807,636.93
Abolition of grade crossings suspense %.....	204,853.89	.....	204,853.89
Total.....	$230,167,861.92 64.06 %	$129,148,163.97 35.94 %	$359,316,025.89 100 %

25 EXHIBIT TWO.

In the Matter of the Application of NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY for a Revision and Readjustment of the Account Heretofore Audited and Stated by the Comptroller of the State of New York for Taxes Under Section 182 of the Tax Law, for the Year Ending October 31, 1902.

To the Honorable Otto Kelsey, Comptroller of the State of New York:

The amended application of The New York Central and Hudson River Railroad Company filed herein pursuant to leave granted by the said Comptroller respectfully shows:

1. That it is a railroad corporation duly organized and existing under the laws of the State of New York, and as such during the aforementioned tax year was engaged in operating certain railroads by it owned and leased in the State of New York, and certain railroads by it leased in other States, and therein as a common carrier for hire transacting the business of the transportation of persons and property, and that thereby and therein a part of its capital was employed in this State, and that continuously during the said tax year a part of its capital was employed outside of and not employed within the State of New York.

26 2. That on or about the 15th day of November, in the year 1902, it duly made a written report to the Comptroller of the State of New York as required by subdivision 1 of Section 189 of the Tax Law, such report being in the form prescribed by the said Comptroller of the State of New York; and that such report showed the condition of the said company at the close of its business on October 31st preceding, and that in said report was stated the

amount of its authorized capital stock, the amount thereof issued and outstanding, the date and rate per centum of dividend declared by it in each quarter of the year ending on the said October 31, 1902, the entire capital stock of the said corporation and stated correctly, except as shown in paragraph 4 hereof, the amount thereof employed in this State during the said tax year, computed upon the basis in and by the said report set forth. That as set forth and shown in and by the said report the amount of the authorized capital stock of this company was $150,000,000, of which there was issued, paid up and outstanding from November 1, 1901, to April 30, 1902, $115,000,000, and from May 1, 1902, to October 31, 1902, $131,916,300, an average for the said tax year of $123,458,150, and that the average value of said capital stock during the said tax year was $162.125 per share, thus showing that the value of its entire average amount of issued capital stock was $200,156,525.69, and no more.

3. That the total assets of the said petitioner wheresoever employed in and during the said tax year amounted to the sum of $359,316,025.89, and no more, of which assets amounting to the sum of $227,856,175.92, and no more, were employed within the State of New York, and of which total, assets amounting to
27 the sum of $131,459,849.97 were continuously and at all times in and during the said tax year employed outside of and not within the State of New York. That the average amount of its capital stock at par employed within this State was $78,289,583.32 of the average value of $126,926,986.95, and that of the average amount of its entire capital stock $45,168,566.68 of the average value of $73,229,538.74 was continuously and at all times in and during the said tax year employed outside of this State, and the tax lawfully computed and imposed in respect thereof was and would be the sum of $190,390.48, and no more.

4. That in and about the division of items of petitioner's said total assets pertaining to and for its said report to the State Comptroller the said petitioner by inadvertence embraced and included its entire holding of $2,597,400 of the capital stock of the Merchant's Despatch Transportation Company as of and being assets employed within the State of New York, whereas in truth and in fact only and no more than $285,714.00 thereof was employed within this State in or during the said tax year, thus involving and presenting an excess of $2,311,686.00 over and above the amount of its total assets in fact employed within the State of New York in and during the said tax year.

That computation upon the said basis erroneously made it to appear that $794,277.06 at par, and $1,287,721.68 at average value of petitioner's capital stock was employed in this State, which was not in fact employed therein in and during the said tax year, and thus constituted an apparent basis for computation and imposition of tax thereon in the sum of $1,931.58 which was in truth and in fact erroneous and excessive.

5. That subsequent to the said 15th day of November,
28 1902, to wit: on or about May 6, 1903, the said Comptroller audited and stated the account of taxes to be paid by said

company and sent to it notice thereof. That the said account so audited and stated was of and for a tax of $209,234.23, purporting to be a tax of one and one-half mills upon an appraised valuation of $139,489,483.06, the supposed basis thereof being that there was employed within this State in and during said tax year $250,408,057.07 of petitioner's said total assets, $86,038,231.69 of petitioner's said average capital stock at par, and $139,489,483.06 of average value of petitioner's said total capital stock.

6. That the said appraised valuation of $139,489,483.06, upon which the said tax was as aforesaid computed and imposed, included therein $12,562,496.11 of, as and being the appraised valuation of capital stock of the said company, no part of which was or consisted of such portion of the capital stock at par of the said company, as the amount of its capital employed within the State of New York in or during the year for which the said report was made, and for which the said tax was imposed, bears to the then entire capital of the said company; that the said tax so imposed upon the said $12,562,496.11 amounts to the sum of $18,843.75; that the said company has insisted and now insists that the said tax of $18,843.75 upon the sum of $12,562,496.11, no part thereof being of or within such portion of its capital stock at par as the amount of its capital employed within this State bears to its entire capital, was erroneously and unlawfully assessed and imposed and payment thereof could not and cannot be lawfully demanded, and that the said $18,843.75 of tax is wholly without authority of law.

29 7. That in truth and in fact only and no more than $78,289,583.32 of the capital stock of said company was the portion of its said entire capital stock at par which bore the same relation to the said entire capital stock as the amount of capital employed within the State of New York in or during the year for and on account of which said report was made and the said tax imposed, bore to the entire capital of said company; and that the balance of the entire amount of its capital stock, to wit, the amount of $45,168,566.68 thereof, bore the same relation to the amount of capital which was during the said year employed outside of the State of New York; by reason whereof the said company avers that the sum of $18,843.75, the purported tax of one and one-half mills upon $12,562,496.11 in excess of the $126,926,986.95, the value of the amount of $78,289,583.32, the par value of its capital stock employed within this State, is erroneously and unlawfully assessed and imposed, and that payment thereof should not have been demanded and could not and cannot be lawfully demanded, and is without foundation or authority of law.

8. The said petitioner is informed and believes and thereupon alleges that consequent upon misapprehension and erroneous supposition upon the part of the said Comptroller that petitioner had either not included any or had included an insufficient portion of its said holding of $2,597,400.00 of the capital stock of the Merchant's Despatch Transportation Company in the $230,167,861.92 of its assets reported employed in this State, he, the said Comptroller, for and in respect of the portion of said Merchant's Despatch Trans-

portation Company's capital stock deemed by him to have been employed in this State, and not so reported by this petitioner, and as constituting the basis of the tax as appraised, computed and imposed, wholly or in part in respect thereof added to the respective amounts stated in petitioner's said report the following, to wit, to the $230,167,861.92 total assets reported employed in this State, the further amount of $3,593,804.09; to the $128,214,708.63, total average value of capital stock reported employed in this State, the further amount of $2,001,923.90; and as additional tax in respect thereof $3,002.89. And the said petitioner alleges that if and to the extent that the said amounts were not so added by reason of and consequent upon the aforementioned misapprehension and erroneous supposition upon the part of the said Comptroller, they and each thereof were so added without evidence or fact in their support; and that the said additions are and the said $3,002.89 of tax is wholly and altogether and in every part unauthorized, erroneous and illegal, and payment of the said tax should not have been demanded and could not and cannot be lawfully demanded.

9. That the State Comptroller, as and constituting the basis of the tax so as aforesaid by him computed, imposed and demanded, also and further added to the respective amounts in and by petitioner's said report stated and set forth as the basis of and for computation of the said tax for said tax year, for and in respect of the average value of petitioner's movable equipment shown by its said report to have been continuously and at all times during the said tax year used and employed outside of the State of New York, to wit, to the $230,167,861.92, total assets reported employed in this State, the further amount of $16,646,391.06; to the $128,214,708.63, average value of capital stock reported employed in this State, the further amount of $9,272,850.53; and as the additional tax in respect of and computed upon said amounts the sum of $13,909.28.

That the movable equipment of the said petitioner during the said tax year included passenger, mail and express cars of the value of $5,900,640.90, of which 85.66 per cent., or $5,054,488.99, and no more, was the average portion thereof employed within the State of New York, and 14.34 per cent., or $846,151.91, was the average portion thereof which was continuously and at all times during the said tax year employed outside of and not within the State of New York, and that said petitioner's movable equipment also included freight cars of the total value of $27,890,978.20, of which 43.35 per cent., or $12,090,739.05, and no more, was the average portion of the said total freight car equipment which was during the said tax year employed within the State of New York, and that 56.65 per cent., or $15,800,239.15, was the average portion of petitioner's said total freight car equipment which was continuously and at all times during the said tax year employed outside of and not within the State of New York.

That petitioner's said equipment, and the capital invested therein, as and when in manner aforesaid used and employed outside of this

State, whether by this petitioner or by other persons or corporations, were so used and employed solely and exclusively under authority of and in the exercise of corporate franchises granted to corporations of its or their creation by the respective states and territories and foreign dominions within whose territorial jurisdiction the said use and employment were had and conducted and not in the use or exercise of any franchise granted by or taxable in the State of New York, and all in and about the rendering and performance of the common carrier service of the transportation of persons and commodities between points of shipment and points of destination, respectively, within individual states, territories and dominions other than the State of New York, and between points of shipment within the State of New York and points of destination in states and territories other than New York and in foreign dominions, and *vice versa*, and between points of shipment and points of destination and via routes altogether outside of the State of New York, and were thus used and employed in and about transportation local to individual states other than the State of New York and transportation constituting and pertaining to interstate commerce and foreign commerce all in such wise as did and does render it impossible for said petitioner to be informed or state the measure of such transportation employment constituting or pertaining to commerce local to any one or more individual states, or the measure thereof constituting or pertaining to interstate or foreign commerce, by means whereof to state or compute the amount of said assets or capital used or employed in either thereof, as distinguished or distinguishable from the other.

That taxation in and by the State of New York, for and upon and in respect of corporate creation, existence and capacity, for and during the designated term of corporate life, is by and under the law of the State of New York computed upon the basis of the amount of the authorized capital stock, and imposed, and paid, once for all, at the creation of the corporation, subject only to addition upon and in respect of subsequent increase of authorized capital stock.

That the tax here in question has relation to and is imposed in respect of the use and exercise of the corporate franchise granted by the State of New York, and, as such, is, at most, lawfully computable in respect of the use and exercise thereof within this State and upon the basis of the value of that portion of the amount of petitioner's issued capital stock which has been employed within this State during the respective tax year.

That if and in so far as the enactments under color of which this tax is imposed purport to authorize taxation for or upon or in respect of the aforesaid use or exercise of franchises foreign to the State of New York or computed upon the basis of capital thus in manner aforesaid used and employed within the territorial jurisdiction of other states, territories or foreign dominions in the use and exercise of and under the authority of franchises granted by them or by the United States to corporations created by them, respectively, the said enactments are beyond the power and prerogative of the State of New York to prescribe and enforce and are violative of and contravene

the constitution laws and treaties of the United States in that they deprive petitioner of the equal protection of the laws; also, in that they constitute the taking of property without due process of law; also, in that they constitute a regulation of, interference with and a burden upon interstate commerce and foreign commerce; also, in that they impugn the dignity and sovereignty of the United States and of sister states and of foreign dominions; also, in that they impair the obligations of the contracts arising upon and inhering in the grant to and acceptance by the corporations, the lessors and licensors of said petitioner, of the franchises by it as lessee and licensee, used and exercised in respective states, territories and dominions other than and foreign to the State of New York; also, in that they impair the obligations of the contracts of lease of trackage right and license respectively, under and by
34 virtue of which petitioner uses and exercises in respective states and territories other than the State of New York and in foreign dominions the franchises granted by them respectively to the lessors and licensors of said petitioner; also, in that they impair the obligations of the contracts, express and implied, under which petitioner is required to and does order, direct and permit or order, direct or permit its movable equipment to pass to and remain in the custody and subject to the control of other corporations and be by them controlled and used in and about the transportation of persons and property upon their roads in other states and territories and foreign dominions under authority of and in the use and exercise of franchises granted by them respectively; also, in that the said enactments and the judgments of the officers and tribunals in and of the State of New York sustaining and administering them, in and by imposing and exacting payment to the State of New York of a franchise tax computed upon the basis of the capital of said petitioner employed within the territorial jurisdiction of other respective States, in the use and exercise of franchises granted by them, respectively, deny and refuse to give "to the public acts" of said other respective States, by and under which the said franchises are granted and the use and exercise thereof authorized and regulated, the "full faith and credit" force and effect which the said public acts are entitled to have and do have in the respective States whose acts they are, by reason whereof the said petitioner alleges that the sum of $13,909.28, the purported tax of one and one-half mills upon $9,272,850.53 in excess of $126,926,986.95, the value of the amount of $78,298,583.32, the par value of its capital stock employed in the State of New York is erroneously and unlawfully assessed and imposed, and that payment thereof should not
35 have been demanded and could not and cannot be lawfully demanded and is wholly and altogether without foundation or authority of law.

Wherefore the said company makes this application and prays that the said account so audited and stated be revised and re-adjusted and that the said account be re-settled by striking therefrom or by crediting to the account of the said company the said sum of

$18,843.75 and that the said company have such other or further relief as may be proper.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
By E. L. ROSSITER, *Treasurer.*

IRA A. PLACE,
Attorney for the Applicant, Grand Central Station, Borough of Manhattan, New York City, N. Y.

STATE OF NEW YORK, *County of New York, ss:*

Edward L. Rossiter, being duly sworn, says that he is an officer of the New York Central and Hudson River Railroad Company, the applicant above named, to wit, the treasurer thereof; that the foregoing application is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters *be* believes it to be true.

E. L. ROSSITER.

Sworn to before this 9th day of March, 1905.
ALBERT B. QUENCER,
Notary Public, New York County.

36 EXHIBIT THREE.

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

against

OTTO KELSEY, as Comptroller of the State of New York.

Whereas, the above named, The New York Central and Hudson River Railroad Company, heretofore, on or about the 30th day of October, 1903, applied to the Comptroller of the State of New York to revise and readjust the account heretofore audited and stated by the said Comptroller, imposing a tax upon the said The New York Central and Hudson River Railroad Company for the year ending October 31st, 1902, under Section 182 of the Tax Law, and to have said account resettled by striking therefrom, or by crediting to the account of said railroad company the sum of sixteen thousand nine hundred three and 82/100 dollars ($16,903.82), and thereafter and while the said application was pending, to wit, on or about the ninth day of March, 1905, made an amended application to have the said account resettled by striking therefrom, or by crediting to the account of said railroad company the sum of eighteen thousand eight hundred forty-three and 75/100 dollars ($18,843.75), and
37 the said Comptroller having thereafter, a hearing having been had upon the said amended application, made his determination, allowing a credit to the said company on the books of the

department of the sum of four thousand nine hundred thirty-four and 47/100 ($4,934.47) dollars; and

Whereas, the said The New York Central and Hudson River Railroad Company is dissatisfied and aggrieved by the said determination, and intends to review the said determination by writ of certiorari, and desires to file an undertaking with the said Comptroller as required by Section 197 of the Tax Law;

Now, therefore, the National Surety Company, a corporation duly authorized by the laws of the State of New York to execute surety bonds, having an office and principal place of business at No. 346 Broadway, Borough of Manhattan, City of New York, does hereby undertake that if the said writ of certiorari, which may be granted upon the application of the said The New York Central and Hudson River Railroad Company to review the said determination, be dismissed, or the determination of the Comptroller be confirmed, the said The New York Central and Hudson River Railroad Company will pay all costs and charges which may accrue against it in the prosecution of the said writ, including the cost of all appeals, not exceeding the sum of five hundred ($500.00) dollars.

Dated New York, September 18th, 1905.

NATIONAL SURETY COMPANY,
By JOEL RATHBONE, *Res. Vice President.*

Attest: RICHARD J. MORIARTY,
[L. S.] *Res. Assist. Secretary.*

38 STATE OF NEW YORK, *County of New York, ss:*

On this 18th day of September, 1905, before me personally appeared Joel Rathbone, Res. Vice-President of the National Surety Company, with whom I am personally acquainted, who being by me duly sworn, said that he resides in the County of New York; that he is the Res. Vice-President of the National Surety Company, the corporation described in and which executed the within instrument; that he knows the corporate seal of said Company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the board of directors of said Company, and that he signed said instrument as Res. Vice-President of said Company by like authority; and that the liabilities of said Company do not exceed its assets, as ascertained in the manner provided in Section 3, Chapter 720 of New York Session Laws of 1893. And the said Joel Rathbone further said that he is acquainted with Richard J. Moriarty, and knows him to be the Res. Ass't Secretary of said Company; that the signature of the said Richard J. Moriarty subscribed to the said instrument is in the genuine handwriting of the said Richard J. Moriarty and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said Joel Rathbone, Res. Vice-President.

BELLE F. JAIS,
Notary Public for the County of N. Y.

Certificate filed in Kings, Westchester, Richmond and Queens Counties.

39 *Copy of By-Laws.*

Be it remembered, that at a regular meeting of the Board of Directors of the National Surety Company, duly called and held on the 6th day of February, 1900, a quorum being present, the following by-law was adopted:

"ARTICLE XIII. SEC. 1.—*Signatures Required.* All bonds, recog-"nizances, contracts of indemnity and other writings obligatory in "the nature thereof, shall be signed by the President, the Vice-"President, the Second Vice-President, a Resident Vice-President, or "an attorney in fact, and, except when signed by an attorney in "fact, shall have the seal of the Company affixed thereto, duly at-"tested by the Secretary, an Assistant Secretary or a Resident As-"sistant Secretary. The Vice-President, Second Vice-President and "Resident Vice-President shall each have authority to sign such in-"struments whether the President be absent or incapacitated or not; "and the Assistant Secretaries and Resident Assistant Secretaries "shall each have authority to seal and attest such instruments, "whether the Secretary be absent or incapacitated or not. All such "instruments executed as herein provided shall be as binding upon "the Company as if the same were signed by the President, duly "sealed and attested by the Secretary."

STATE OF NEW YORK, *County of New York, ss:*

I, Richard J. Moriarty, Res. Ass't Secretary of the National Surety Company, have compared the foregoing copy of by-law with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original by-law.

Given under my hand and seal of the Company this 18th day of September, 1905.

RICHARD J. MORIARTY,
[L. S.] *Res. Ass't Secretary.*

40 At a Special Term of the Supreme Court, held in and for the County of Albany, at the County Court House in the City of Albany, N. Y., on the 29th day of September, 1905.

Present: Hon. G. D. B. Hasbrouck, Justice.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

against

OTTO KELSEY, as Comptroller of the State of New York.

Order for Issuance of Writ of Certiorari.

Tax of 1902.

On reading and filing the petition verified and dated the 26th day of September, 1905, of The New York Central and Hudson

River Railroad Company, and upon the undertaking heretofore filed by the said railroad company, pursuant to section 197 of the Tax Law, and upon the notice of this application duly served on the Comptroller of the State of New York, and after hearing Harris & Rudd, Esqrs., of counsel for the petitioner, and on motion of Ira A. Place, Esq., attorney for the petitioner, the Attorney General appearing and consenting to the making of the application at this time instead of on September 30th, 1905, it is

Ordered that a writ of certiorari do issue from and out of this Court pursuant to the prayer of the petitioner, directed to
41 Otto Kelsey, as Comptroller of the State of New York, to review the decision and determination of the said Comptroller mentioned and described in the petition, and the question involving the merits therein mentioned, both upon the law and the facts, which writ shall be returnable within twenty days after service thereof upon the said Comptroller, at the office of the Clerk of Albany County.

Enter.

JOHN FRANEY, *Clerk.*

42 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

against

OTTO KELSEY, as Comptroller of the State of New York.

Writ of Certiorari.

Tax of 1902.

Whereas we have been informed by the verified petition of The New York Central and Hudson River Railroad Company, dated and verified the 26th day of September, 1905, that certain proceedings have been had before the Comptroller of the State of New York in a certain matter entitled "In the Matter of the Application of The New York Central and Hudson River Railroad Company for a revision and Readjustment of the account heretofore audited and stated by the Comptroller of the State of New York for taxes under section 182 of the Tax Law, for the year ending October 31st, 1902," upon the amended application of the said Railroad Company to revise and readjust an account theretofore audited and stated by the said Comptroller of the State of New York for taxes to be paid by the said The New York Central and Hudson River Railroad Company under section 182 of the Tax Law, the petition upon which the said amended application was made being verified March 9, 1905, and a hearing upon such application having been had on the 6th day of June, 1905, and the said Comptroller having there-
43 after made his determination and sent written notice of his determination upon such application to the applicant, the

petitioner herein, allowing in part and denying in part the application for revision or readjustment of the said account, and the said The New York Central and Hudson River Railroad Company having now made application to this Court for a writ of certiorari to review, in so far as the said application was denied and refused, the said decision and determination of the said Comptroller.

And we being willing for certain purposes to be certified of such proceedings, if any such were had, do hereby command and strictly enjoin Otto Kelsey, as Comptroller of the State of New York, that he certify and return all and singular the evidence before him on such application, and all the papers and proofs upon the original statement of such account and all proceedings thereon, and all his decisions and actions in the premises, with all the evidence, documents, reports, records and papers relating thereto in his possession or under his control, submitted to or considered by him, concerning the said account and the grounds of his refusal to revise and readjust the same, as prayed for in the petition, within twenty days after the service upon him of this writ, at the office of the Clerk of Albany County, under his proper hand, pursuant to the provisions of the Tax Law and the provisions of Title II. of Chapter 16 of the Code of Civil Procedure, so that our Supreme Court may further cause to be done thereon what of right and according to law ought to be done, and let the defendant have then and there this writ.

Witness the Hon. G. D. B. Hasbrouck, Justice of our Hon-
44 orable Court, at the Court House in the City of Albany, N. Y., the 29th day of September, 1905.

JOHN FRANEY, *Clerk.*

Ira A. Place, Attorney for the Relator, Grand Central Station, Borough of Manhattan, New York City, N. Y.

The above writ is hereby allowed this 29th day of September, 1905.

G. D. B. HASBROUCK,
Justice Supreme Court.

45 *Return.*

Supreme Court, Albany County.

1902.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

against

OTTO KELSEY, as Comptroller of the State of New York.

Otto Kelsey, as Comptroller of the State of New York, the respondent herein, makes return to the writ of certiorari herein as follows:

I. He admits the truth of the allegations contained in paragraphs 2, 3, 5, 6 and 10 of the petitioner herein.

II. He admits that the petitioner is a domestic railroad corporation organized and existing under the Laws of the State of New York for steam surface railroad purposes, having but one kind of capital stock, engaged in operating certain railroads, and was such railroad corporation and was engaged during the year ending October 31, 1902, as a common carrier for hire transacting the business of the transportation of persons and property. That the report of the petitioner referred to in paragraph 3 of the said petition stated the amount of the authorized capital stock of the petitioner to
46 be $150,000,000, of which there was stated to have been issued, paid up and outstanding from November 1, 1901, to April 30, 1902, $115,000,000, and from May 1, 1902, to October 31, 1902, $131,916,300, an average of $123,458,150. That the dates of payment of dividends and the rate thereof were as described in paragraph 4 of said petition. That the said report stated the entire amount of the capital or assets of petitioner to be $359,316,025.89 and that said report stated that $230,167,861.92 was the amount employed within this State and that $129,148,163.97 was the amount employed without the State, as stated in said report.

III. He further admits that the application and the amended application for the revision and readjustment of the account for taxes, mentioned in paragraph 7 of the petition, were made. That the application was granted and the rehearing held, at which time the petitioner appeared by its counsel, and submitted evidence. That the Comptroller thereupon resettled and readjusted said tax at the sum of $204,299.76 computed at the rate of one and one-half mills on the valuation of $136,199,837.52.

IV. He denies the truth of the allegations of said petition, except as the same are expressly admitted herein.

V. He returns herewith the evidence and exhibits used in the proceedings before him, except those, copies of which are attached to the petition herein.

VI. He further alleges that the franchise tax, mentioned in said petition, was regularly, duly and legally imposed, settled and
47 collected, pursuant to the provisions of the Tax Law of this State, and that the relator is not justly aggrieved thereby.

In witness whereof, the Comptroller has hereunto set his hand and seal this 20th day of October, 1905.

OTTO KELSEY, *Comptroller.*

[L. S.] By WILLIS E. MERRIMAN,
2nd Dep. Comptroller.

(Endorsed.)

SIR: Take notice that the within is a copy of a return duly filed and entered in the office of the Clerk of Albany County, on the 20th day of October, 1905.

Yours, etc.,
JULIUS M. MAYER,
Attorney-General, Attorney for Resp'd't.

To Ira A. Place, Attorney for Relator.

48 State of New York, Comptroller's Office.

In the Matter of the Application of the NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY for a Revision and Readjustment of Taxes Assessed Under the Provisions of Chapter 908, Laws of 1896, and the Acts Amendatory Thereof for the Years 1902, 1903 and 1904.

Rehearing held at the office of the State Comptroller, June 6th, 1905, before Honorable Clark H. Timerman, Deputy State Comptroller.

Appearances.

J. H. Foulds, Jr., for the Company.
F. E. Williamson, for the Company.
Ira A. Place, represented by Thomas Emery, as counsel.

By COUNSEL: Now we have the three capital stock matters.

Mr. MERRILL: 1902, 1903 and 1904.

By COUNSEL: Yes, it will be a useless repetition to take the evidence separately for each, unless for reasons you desire to have it so.

Mr. MERRILL: Just make a statement of your contention, Mr. Emery.

49 By COUNSEL: Well, briefly, it is set out in our application, of course. Taking up the first, the year 1902.

Mr. MERRILL: What is this amount of $2,311,686.00, for instance, in this 1902 contention, what is that, on what ground do you claim that that should be excluded?

By COUNSEL: That is the capital stock of the M. D. T. Co.

Mr. MERRILL: Yes, that is the only new question you have involved here, that capital stock.

By COUNSEL: This is the situation, to state it as briefly as I can. In a previous year we had made the question whether we should be taxed on our holdings of Merchant's Despatch Transportation Company stock. We had been reporting it, including for taxation such percentage as we understood, such percentage of our holdings of that stock as constituted proportion of M. D. T. stock capital employed in this State. The Appellate Division, when the matter went there for review, held that we were liable to be taxed for all of it, and pending that judgment and before its review by the Court of Appeals one of our reports was made following judgment of the Appellate Division and including it all. Subsequently that was reversed and our contention sustained by Court of Appeals, but our Tax Department didn't understand that, and it resulted in the following year they included it all. On the other hand, this office supposed we hadn't included any of it. At any rate, that is the understanding I have of it, which I think Mr. Merrill will confirm, that we had included it all, and they thought we hadn't included any, so they added to it what they claim should be in. That

50 was one item, and that is the essential thing in which the figures are changed in the amended application from the orig-

inal one, because in the meantime we learned where we were at, and that is we had made one mistake and the office here made another by reason of misapprehension of what we had done.

By Deputy Comptroller TIMERMAN:

Q. You wish to have this tried out along lines of Court of Appeals decision?

By COUNSEL: I do not think there is any question between us about that now. As I understand it it is simply to get proper figures before this department,

What I have said thus far would not give you complete idea of change of our application. The amended application changes further this feature. In the other cases we put in the evidence calculated to lay the foundation, as we thought, for a review by the United States Supreme Court, if desirable. Upon the hearing in the Court of Appeals our remittitur was made to show that the constitutional questions were raised, and in order to put beyond peradventure any question on that subject we amended this application conformable to the same applications made for other years, so as to set that question out clearly. The only things I think necessary for us to go into in this examination are the showing of the facts of what we undertake to show:

First, what the correct report would have been if we hadn't labored under this misapprehension that I speak of. By that disclose just what error there was in our report as made. Then show what the additions were that were made to that report in this department;

51 that is, first, as I have said, the M. D. T. stock which we had erroneously included entire, and the department supposed we hadn't included at all; and second, that outside claim. That is really our more important question in the case. That is to say, practically 60 per cent. of our rolling stock, that is in our freight cars and a considerable percentage of our passenger cars, but much smaller, are constantly in the service upon foreign lines and outside of the State. It is not any particular cars that are so used. They are changing every day and every hour of the day, so with something upwards of forty millions worth of rolling stock we have the use ourselves of practically two-fifths of it. That is to say, the other three-fifth-, substantially that, is on foreign roads, and in use by them, and largely in use that we cannot control, if we wanted to, because in the course of business cars are transferred from one company to another without consultation at all with the owning company. In addition to that the company operates what in general terms is known as New York Central System. That includes the Boston and Albany, essentially in Massachusetts; the West Shore and Jersey Junction in New Jersey, and quite a number of roads in Pennsylvania. Our cars are used on all of these lines together. We contend then that instead of all of this entire rolling stock being regarded as assets employed in this State, and hence to be made the basis of computation of the amount of our capital stock employed in the State, that these portions, to wit, the portion which we use on our operated lines in the New York Central System, but outside of New

York State, should be deducted, and that the portion used upon foreign lines and outside of New York should be deducted.

52 J. H. FOULDS, JR., being duly sworn, testified as follows:

By COUNSEL:

Q. Mr. Foulds, state where you reside, please?
A. Where I reside?
Q. Yes?
A. White Plains, New York.
Q. By whom and how are you employed?
A. By the New York Central, in the Auditor's office, assistant to Mr. Meeder, Chief Clerk.
Q. How long have you been engaged there in substantially the same line of service?
A. Since February, 1902.
Q. And what has been the fact in the meantime as to your making or assisting in the making of reports made by the company, or on its behalf, to the State Comptroller for taxation with reference to the capital stock of the company?
A. Well, they have been prepared largely by me personally or under my supervision.
Q. You gave attention to them for the purpose of knowing their accuracy, did you?
A. Yes, sir.
Q. And what is the fact as to whether you have, at my instance, prepared a statement with reference to that report, and the capital stock subject to taxation, a copy of which I now hand you?
A. I prepared this statement in response to your request.
Q. What have you to say as to figures set out in it under the separate headings being or not being corrrect?
A. I believe them to be correct.
Q. The first item upon this paper, to which I have called your attention, Mr. Foulds, total assets, what does that mean?
A. That represents the total assets of the New Yorrk Central and Hudson River Railroad, as shown by the balance sheet.
Q. For that year?
A. Of October 31st, 1902.
53 Q. And the item, "average capital stock at par," what does that mean?
A. That represents the result obtained by taking the highest amount of stock outstanding during the year and the lowest amount and averaging. The highest amount outstanding at par and the lowest amount outstanding during the year and averaging according to the number of months in which each was outstanding.
Q. And the item, "average cash value $200,156,525.69," what does that mean?
A. That is the average capital outstanding at par, multiplied by average price of stock during this year.
Q. And the row of figures across the page under the heading "Revised Statement," and with reference to their respective head-

ings under which the figures appear, upon what are the computations based by which the results stated are shown?

A. Those figures under heading of "Revised Statement," those figures are obtained by taking our report figures and deducting from them the eighty-nine per cent. of M. D. T. stock, which we reported under a misapprehension in total.

Q. And so, then, the figures reading across the page under the words "as per report," they are the figures as the reports show?

A. Those are the figures as per report sent to the Comptroller.

Q. And upon the basis that you computed it then the revised statement amounted merely to the deduction of that eighty-nine per cent. of M. D. T. stock from the amount in report?

A. Yes, sir.

Q. Now, in making these computations as shown under the heading "Revised Statement," you computed as not employed in the state the items in the two lines under the heading "Add Outside Equipment," did you?

A. Yes, sir.

Q. Now state, if you please, with reference to these items under the heading "Outside Equipment," first, is statement "4,780,862.98" under the heading "Assets Employed in New York State,"
54 that is, you mean employed in New York State as the basis of computation of the tax that this office imposed?

A. Yes, sir.

Q. And that $4,780,862.98 is made up how—what is it composed of?

A. It is composed of the value of the equipment arrived at on a basis of car mileage on New York Central system outside the State of New York.

Q. And the item under the same head; that is, under the same general heading but under the subheading "on foreign roads $11,865,528.08," what does that mean and how was it arrived at?

A. That amount is computed upon the basis of car mileage, as representing the use of New York Central cars on foreign lines outside the State of New York.

Q. And the item in the left-hand column, item last but one, $3,593,804.09, was the difference, was it, between the items of assets accounted for in the previous items and the total, which was apparently made the basis of taxation as imposed by this office, as you understand it?

Objected to by Mr. Merrill on the ground that it is a conclusion without any substantiation whatever.

By COUNSEL: I am simply asking him to explain what that one item is making up that total.

By Deputy Comptroller TIMERMAN: I think there should be some proof on which apparent sum is obtained by which you claim we make this taxation.

Objection withdrawn.

A. It was.

By COUNSEL: I offer statement in evidence.

55 By Deputy Comptroller TIMERMAN: Do you offer this statement as proof of the facts contained therein?

By COUNSEL: I offer it with the witness's testimony as part of his testimony.

By Deputy Comptroller TIMERMAN: Merely as explaining his contention?

By COUNSEL: Yes.

By Deputy Comptroller TIMERMAN: And not as proof of the facts contained therein?

By COUNSEL: Except as his testimony as he had given.

By Deputy Comptroller TIMERMAN: That stands for itself.

By COUNSEL: I offer it as part of testimony of the witness.

By Deputy Comptroller TIMERMAN: If it is offered as proofs of facts contained therein, I do not think we can receive it.

By COUNSEL: Only in sense that his testimony is offered as proof.

By Deputy Comptroller TIMERMAN: That stands for itself; now you offer paper in addition to his testimony.

By COUNSEL: Not in addition to it; I offer it as part of his evidence.

By Deputy Comptroller TIMERMAN: For all purposes, without any limitations?

By COUNSEL: As part of his evidence.

By Deputy Comptroller TIMERMAN: Then I do not think I can receive it. I will receive it if it isn't offered as proof of facts, but merely as computation, showing position which you take in these matters.

By COUNSEL: I will proceed with some further questions.

Q. In the course of its business, Mr. Foulds, does the com-

56 pany have reported to it the whereabouts and employment of its equipment from time to time?

A. I don't just understand the question.

Q. Question read by stenographer?

A. It does.

Q. And is memoranda preserved of such report?

A. Yes, sir.

Q. And in making up, or doing what you did with reference to making of the report of the company to this office for the purposes of taxation, did you have access to that data?

A. Not directly.

Q. Well, explain how it was, and from what source you got information?

A. We received the basis upon which the use of cars within and without the State is computed from the office of Superintendent of Freight Transportation, who has charge of such records.

Q. And from the reports which that office made to you, then, you made the computation?

A. Yes, sir.

Q. And what have you to say as to whether the sources of information from which and upon which you acted in the making up of the statement to which I have called your attention, were or were not

the same as those which you availed yourself of for purpose of making the report to this department?

A. I believe them to be the same.

Q. What was the total value of the company's equipment for the year 1902?

A. $46,619,097.89.

Q. How much of that was what is known as floating equipment?

A. $1,937,224.27.

Q. And that left as rolling equipment how much?

A. $44,681,873.62.

Q. And what do you say was the amount of this equipment used on foreign roads during that year?

A. The total amount?

Q. In use on foreign roads outside New York State?

A. $11,865,528.08.

57 Q. Then, how much of this equipment was used on foreign roads in New York State?

A. $1,409,970.40.

Mr. MERRILL:

Q. You mean other than New York Central system in New York State?

By COUNSEL:

Q. The meaning in the last question was roads foreign to New York Central system, but situate within the State of New York; is that the way you understood in answering it?

A. That is the way I understand the use of foreign roads.

Q. And that left, then, the total value of rolling equipment in use in New York Central system, how much?

A. $31,406,375.14.

Q. And of that amount which you have last named, how much was used on the New York Central system, but outside of New York State?

A. $4,780,862.98.

Q. What, then, was the amount of equipment in use in New York State on the New York Central system for that year?

A. $26,625,512.16.

Q. In the making of, or supervising the making of, reports to this department for taxation for the year ending October 31st, 1902, then what items of assets and amounts of each of this equipment did you count as constituting assets which should be considered in computing the amount of capital stock subject to taxation for that year?

A. The value of equipment in use in New York State on New York Central system, $26,625,512.16; on foreign roads, $1,409,970.40; floating equipment, $1,937,224.27.

Q. And that made the amount of these assets in the way of equipment to enter into basis of taxation, a total of what?

A. $29,972,706.83.

Q. In the business and operations of the New York Central and

Hudson River Railroad Company, is there or is there not what is recognized as the New York Central System?

A. There is.

58 Q. And what does that include?

A. Includes the New York Central and Hudson River Railroad.

Q. In a general way?

A. And its leased and operated lines.

Q. That is, all lines operated directly by New York Central and Hudson River Railroad Company?

A. Yes, sir.

Q. And those lines are situated in what State?

A. New York, Massachusetts, Pennsylvania and New Jersey.

Q. What is the fact as to its operated roads outside of New York State as to whether they are all or approximately all operated under leases?

A. I believe they are all operated under lease.

Q. In some instances trackage rights where this company and another or other companies operate over same rails?

A. In addition to leased lines we hold some trackage rights over other lines.

Q. What have you to say as to whether the memorandum here submitted to you sets forth correctly the leases under which this company operate the lines therein mentioned during the tax year in question, and as to the respective companies having been incorporated by those respective States as of the dates set forth?

A. To the best of my knowledge and belief the record is correct.

Q. And what is the fact as to these respective leases requiring the lessee company to pay all taxes upon the leased property as a part of its rental?

A. To the best of my knowledge and belief that is correct. Memorandum of lines operated by N. Y. C. as a part of its system in the states named:

Massachusetts:

Boston & Albany, incorporated January 10, 1871, by consolidation of numerous roads.

Leased November 15, 1899.

59 New Jersey:

West Shore Railroad, incorporated (reorganization) December 5, 1885.

Leased December 5, 1885.

Hoboken & Hudson River Turnpike Co. (Bull's Ferry to Hoboken), incorporated March 16, 1857; merged in New York and Bull's Ferry Railroad Company (Bull's Ferry to Jersey City), incorporated March 14, 1861; name changed to New York and Ft. Lee Railroad Company March 9, 1862.

Leased June, 30, 1886.

Hoboken Land & Improvement Company (Weehawken southerly to other railroads), incorporated March 8, 1860.

Leased March 1, 1886.

New Jersey Junction Railroad Company (Township of Union t
Jersey City), incorporated February 27, 1886.

Leased July 1, 1886.

New Jersey Shore Line Railroad Company (Township of Union
Hudson County, to Town of Harrington, Bergen County), incorpo
rated March 2, 1886.

Stock owned by N. Y. C.

Pennsylvania:

Dunkirk, Allegheny Valley and Pittsburgh, incorporated (con
solidation), December 31, 1872.

Leased January 3, 1873.

Jersey Shore, Pine Creek and Buffalo (Jersey Shore to Port Alle
gheny, McKean County), incorporated February 17, 1870; nam
changed to Pine Creek Railway Company February 13, 1884.

Leased May 1, 1899.

Beech Creek Extension Railroad Company, incorporated (con
solidation) March 30, 1891.

Leased May 22, 1901.

60 Clearfield Southern Railroad Company, incorporated July
6, 1898; certificate amended October 26, 1903.

Leased October 1, 1903.

Syracuse, Geneva & Corning, incorporated (consolidation) No
vember 2, 1885.

Leased May 1, 1899.

Curwensville & Bower, incorporated March 31, 1903.

Leased March 31, 1903.

Pittsburgh & Eastern, incorporated (consolidation) Novembe
16, 1896.

Agreement for operation, December 27, 1899.

Leased February 24, 1904.

Corning, Cowanesque & Antrim, incorporated (consolidation)
January 2, 1873; name changed to Fall Brook Railway Company
July 1, 1892.

Leased May 1, 1899.

Beech Creek Railroad Company, incorporated June 30, 1886 (re
organization).

Leased October 1, 1890. Cambria County Railroad Company
incorporated August 31, 1896; consolidated with Beech Creek Rail
road Company under name of Beech Creek Railroad Company, Ma
11th, 1898.

Statement headed "New York Central Capital Stock Tax 1902"
marked "Exhibit A for identification."

By COUNSEL:

Q. Mr. Foulds, the statement marked "Exhibit A for identifi
cation," do you identify that as the one to which your attention wa
directed and concerning which you gave various respective answer
in your previous testimony?

A. I do.

By COUNSEL: I now offer this statement in evidence as a part of the testimony of the witness.

61 Mr. MERRILL: I object to so much of it as is a conclusion.

Deputy Comptroller TIMERMAN: I think that part I will have to sustain.

Exception taken.

By Mr. MERRILL:

Q. Mr. Foulds, what balance sheet did you take this total statement of assets from?

A. Balance sheet of New York Central and Hudson River Railroad Company in the auditor's office.

Q. Does this statement of assets include the original cost of these assets?

A. I believe they do in all cases.

Q. Without deduction?

A. Without deduction.

Q. In arriving at the average amount of the capital stock issued and outstanding during the year ending October 31st, 1902, you did not take, as I understand you, the amount outstanding on November 1st, 1901, and then by determining the number of days that the several shares of stock issued in addition thereof were outstanding, obtained the average in that way?

A. Well, we obtained it by taking the number of months that a certain amount was outstanding and the number of months that another amount was outstanding, adding the two together and dividing it by twelve.

Q. Will the books of the company show the dates of issue of these several amounts of capital stock?

A. They will.

Mr. MERRILL: The Comptroller asks you to furnish a statement of the several dates when capital stock was issued, and the amounts issued on the several dates of the capital stock of the New York Central and Hudson River Railroad during the year ending October 31st, 1902.

62 Q. In the testimony which you have given in relation to equipment outside of the State of New York, do you know, or has there been any computation made which would show whether or not any of the equipment of the New York Central and Hudson River Railroad Company was used continuously and exclusively without the State of New York?

A. So far as I am aware there is not.

Q. None of it?

A. As far as I am aware there has been no such computation in connection with this report.

Q. Do you know whether there is any such equipment which is used continuously and exclusively without the State?

A. I do not.

Q. Do the figures which were furnished you show any such thing?

A. They do not.

Mr. MERRILL: The Comptroller will ask you to furnish a statement of all equipment of the New York Central and Hudson River Railroad Company used continuously and exclusively without the State of New York.

By COUNSEL: It is admitted that there is no substantial amount of the equipment of the New York Central and Hudson River Railroad Company that was used permanently continuously or exclusively without the State during the entire tax year in question.

By Mr. MERRILL:

Q. In the computation which was made Mr. Foulds, based on mileage without and within the State that might be so made as to include a great many hundred miles of car mileage for one car and very little car mileage for another, might it not without regards of property value of the car itself?

A. I believe that it might.

Q. For instance, if a carload of goods of any description should be shipped in one car from New York to San Francisco, in
63 such a determination as that the wheelage of that one car might be very large, larger than the wheelage of a half dozen or more cars employed constantly within the State of New York, might it not?

A. It might.

Q. What was the total value of the equipment of the New York Central and Hudson River Railroad Company during the year ending October 31st, 1902, on the average?

A. In round figures?

Q. You know, exactly, don't you?

A. $46,619,097.89.

Q. That was the cost of that equipment, was it?

A. That is the amount charged on the ledgers.

Q. As the cost?

A. As the cost of that equipment.

Q. Now, what was the amount of the stock of the Merchant's Despatch Transportation Company which you claim was employed in the State of New York, and the property of the New York Central and Hudson River Railroad Company?

A. Eleven per cent. That eleven per cent. means eleven per cent. of the amount owned by the New York Central.

Q. Mr. Foulds, you have testified that upon the figures supplied you by the Auditor's Department of the New York Central and Hudson River Railroad Company, the percentage of the stock of the Merchant's Despatch Transportation Company, owned by the New York Central and Hudson River Railroad Company and employed in New York State, was eleven per cent.?

A. Yes, sir.

Q. Have you any knowledge as to how that basis was arrived at?

A. I have not.

Mr. MERRILL: Well, the Comptroller desires to submit a copy of the determination made by this department with relation to the portion of capital stock of the Merchant's Despatch Transportation

Company employed in conducting its business in this State,
64 after a hearing held before Deputy Comptroller Timerman on May 4th, 1904, for the year ending October 31st, 1903, and the amount of capital stock outstanding for that year being the same as it was heretofore.

By COUNSEL: I object to it on the ground that it is immaterial and irrelevant.

Mr. MERRILL: It is immaterial, because it shows more than three times the amount the New York Central claims was employed here.

Deputy Comptroller TIMERMAN: As I understand it, this inquiry here doesn't cover any period of any tax that was determined in this proceeding of May 4th.

Mr. MERRILL: No, but the same amount of capital stock was outstanding in the Merchant's Despatch Transportation Company in both years, so that the percentage employed here would be the same for both periods.

Objection sustained.

By Mr. MERRILL:

Q. Mr. Foulds, is there anything in the possession of the New York Central and Hudson River Railroad Company, either upon their books or otherwise, that would show conclusively the amount of the capital stock of the Merchant's Despatch Transportation Company used and employed in the State of New York during the year ending October 31st, 1902?

A. I don't believe there is.

Mr. MERRILL: The Comptroller asks that the New York Central and Hudson River Railroad Company produce at this office a witness or witnesses who are competent to testify as to the portion of the capital stock of the Merchant's Despatch Transportation Company em-
ployed in doing business in this State during the year ending
65 October 31st, 1902. Will the company produce it?

By COUNSEL: I don't know; if we don't we cannot get the benefit of it.

By Mr. MERRILL:

Q. Have you any knowledge as to how this eleven per cent. basis was arrived at?

A. I have not.

Q. Mr. Foulds, is there any legal entity by the name of the New York Central System?

A. I do not think there is.

Q. Don't you know that there isn't?

A. Yes, sir.

Q. You simply use that term relatively to cover lines leased by the New York Central and Hudson River Railroad Company, over which it operates its cars?

A. Yes, sir.

Q. Over which it operates owned and leased lines?

A. Yes, sir.

Q. Is it or is it not a fact that the New York Central Company operates the cars of other companies over its own and leased lines?

Objected to by Mr. Emery, on the ground that it is irrelevant and immaterial. The tax here is on our capital; it is the employment of our capital in this State, and an unjust tax on our capital is not to be excused by showing that the law might make us liable for taxation on some other body's capital.

Deputy Comptroller TIMERMAN: While that might be true, Mr. Emery, I think I will receive the answer to this question, merely as part of the cross-examination.

Exception taken.

A. It does receive cars from other companies.

Q. Is that true with relation to their equipment, too?

Same objection, same ruling. Exception taken.

66 A. I believe not.

Q. Doesn't apply to locomotives and other equipment besides cars?

A. I should say not.

Q. When a car starts from the City of New York and travels westward over the lines of the New York Central Railroad Company and other railroad companies to California, and is then returned either empty or loaded with freight, does that car as property become the subject of taxation elsewhere than in the State of New York?

Objected to by Mr. Emery as incompetent, irrelevant and immaterial.

Mr. MERRILL: I show, Mr. Comptroller, that this property has its *situs* in the State of New York and nowhere else.

Objection overruled. Exception taken.

A. I do not know.

Q. Where does the ownership of the railroad of the New York Central and Hudson River Railroad Company end at its eastern (western) terminal?

A. City of Buffalo.

Q. Does the New York Central and Hudson River Railroad Company, as a railroad company, operate west of the City of Buffalo?

A. It does not—some little points beyond, between Black Rock, or something of that kind.

Q. None beyond the State of New York?

A. No, that is what I understand you to say.

Q. Then Mr. Foulds, when you have figured the car wheelage, mileage west of Buffalo, you have been figuring the business conducted by some other railroad company than the New York Central Railroad Company, have you not?

A. We have.

Q. What is the par value of the ownership of the New York Central and Hudson River Railroad Company in the stock of the

67 Merchant's Despatch Transportation Company?

A. I couldn't say from memory—$2,597,400.00.

Q. Does that item of ownership, or a portion of it, appear in the

$109,669,172.12 reported to the Comptroller as stocks of other companies outside the State of New York?

A. Does not.

Q. Where does it appear in this report?

A. Appears in the column headed "in the State of New York."

Q. The entire amount appears in there, does it?

A. It does.

Q. What is this "outside State of New York" amount made up of?

A. In the ownership of companies outside the State of New York.

Q. What companies?

A. Lake Shore and Michigan Southern, Michigan Central and other companies.

Q. Now, the cost of the road and equipment, excluding only that equipment which you claim was employed outside the State of New York was $174,618,395.45, was it not?

A. It was.

Q. In addition to that the company has claimed that this equipment, which it is admitted was practically none of it exclusively and continuously employed outside the State of New York, was $16,646,391.06, was it not?

A. It was.

Q. Now, under the head of "In State of New York" lessor companies, what does the term "lessor companies" mean?

A. It means money advanced or expended upon the roads of lessor companies of the New York Central, leased lines.

Q. And did the New York Central and Hudson River Railroad Company advance these moneys upon notes?

A. Not to my knowledge.

Q. How were they advanced generally?

A. Amounts spent upon the property by the New York Central.

Q. And had the New York Central no means of the re-
68 covery of the amount so expended?

A. Not in all cases.

Q. Well, how about a vast majority of the cases?

A. I should say to some extent they would have means.

Q. What did the New York Central and Hudson River Railroad Company have to show for such advances?

A. Nothing but the charge against the line, against the road.

Q. Charge against the road upon its books of account?

A. Yes.

Q. Well, then these two amounts, Mr. Foulds, $6,044,757.71 and $2,283,128.03 represent investments made upon leased line by the New York Central and Hudson River Railroad Company within and without the state respectively?

A. Yes, sir.

Q. And in the report rendered to Comptroller for the year ending October 31st, 1902, in the item of $16,499,270.65, stocks of other companies in the State of New York, you included the entire ownership of the New York Central and Hudson River Railroad Company in the stock of the Merchant's Despatch Transportation Company?

A. We did.

Q. In the statement of $109,669,172.12, stocks of other companies outside the State of New York, did you include in that the percentage of the stocks of those companies employed in doing business in the State of New York; for instance, as in the case of the Lake Shore and Michigan Southern Railway Company, did you include a portion of their capital stock in which you had an ownership as being employed in this state, or not?

A. We did not. The capital stock of the Lake Shore and Michigan Southern Railway owned by the New York Central was divided upon the basis of the amount of road mileage of the Lake
69 Shore in the State of New York compared with the total road mileage of the Lake Shore Railroad.

Q. Now, Mr. Foulds, the items of cash and cash assets, ownership in other lines, real estate, etc., fuel and supplies, bonds bought for account sinking fund and abolition of grade crossing suspense account, all of them were correct as in the original return, were they not?

A. I believe they were, that is right.

F. E. WILLIAMSON, being duly sworn, testified as follows:

By COUNSEL: Where do you reside Mr. Williamson, and how and where are you employed?

A. I reside in New York City, and am employed as chief clerk to the Superintendent of Freight Transportation of the New York Central Railroad.

Q. How long have you been employed by the company and in what line of service?

A. I have been in the employ of the company about seven years, working in various capacities in the freight service in the Division Superintendent's office and later on in the office of the Superintendent of Freight Transportation.

Q. How long have you been in that office?

A. About a year and a half.

Q. Have your duties there made you familiar with the method of reporting the whereabouts of cars and the companies in whose service they are and change of hands from one company to another?

A. They have.

Q. And with the data that is received and kept by the company concerning those deliveries?

A. They have.

Q. Mr. Williamson, have you, at my request, prepared a record of some several car movements of cars off the lines, or to and
70 from and off of the lines of the company?

A. Yes, these were prepared under my direction.

Q. And prepared from the data that you speak of in the possession of the company?

A. Yes, from the original record.

Q. And what you have to say as to their being correctly transcribed from the record?

A. I believe them to be correct.

Q. For instance, car number 31,772, from Schenectady to Clear-

water, South Carolina, that means, does it, that the car left the company's line at Schenectady on the 6th of March, 1902?

A. No, sir, the car was loaded at Schenectady for Clearwater, South Carolina, via Canandaigua—left our line at Canandaigua.

Q. On the 8th of March?

A. Yes, sir.

Q. And when did that car come back to the possession of the New York Central Company?

A. Was returned to us on July 2d of the same year.

Q. By what company?

A. By the Erie.

By COUNSEL: Without examining into detail each of these, I offer this in evidence.

Objected to by Mr. Merrill, for the reason that it does not show the fact that any of the equipment of the New York Central and Hudson River Railroad Company was continuously and exclusively employed during the year in question outside the State by any company, corporation or individual, nor does it show the fact that the New York Central and Hudson River Railroad Company did any business with such equipment outside the State of New York.

By COUNSEL: Of course, it is of no consequence whether we did business with it, or somebody else did business with it. We
71 offer it for the purpose of showing the general course of business by which our cars left our lines.

Objection overruled.

Received and marked "Exhibit B."

By COUNSEL: I desire also to offer in evidence the same record of car movements that were received in the other case.

Deputy Comptroller TIMERMAN: Is this offered for the purpose of proving that these cars were operated exclusively outside the State of New York, or that they were operated at all outside the State of New York by the New York Central Company?

By COUNSEL: No.

Deputy Comptroller TIMERMAN: Inasmuch as it isn't claimed that these exhibits will prove either of those facts, and as matter of fact it isn't claimed, I suppose that that really was the fact?

By COUNSEL: No, our cars are going to and from us and back and forth between other people daily and hourly.

By Deputy Comptroller TIMERMAN: Then it will be received. Marked "Exhibit B-1."

By COUNSEL: Now, I offer record of car movements as contained in papers on appeal from order, proceedings 1900, in case in the Court of Appeals, pages 53 to 59 inclusive.

Received subject to the same limitations.

Marked "Exhibit C."

Q. Calling your attention, Mr. Williamson, to the record of movements of car 41,278, as shown on page 53, of the Court of Appeals case, tax 1900, state, if you please, where that car was destined to when it left the company's line?

A. You ask me New York Central 41,278, where it was destined?

Q. Yes?

A. Detroit, Michigan.

72 Q. Car number 41,038, where was it destined to?

A. I have no destination on that.

Q. Car number 59,578?

A. Destined Shicago, Illinois.

Q. Car number 63,158?

A. Chicago, Illinois.

Q. Car number 18,236, where was it destined to?

A. Grand Rapids, Michigan.

Q. Car number 63,123?

A. Cleveland Transfer, Ohio.

Q. Car number 63,176?

A. Edison, Ohio.

Q. Car 64,431?

A. Chicago, Ill.

Q. Car number 61,831?

A. San Francisco, California.

Q. Car number 14,035?

A. Delivered Lake Shore, December 20th, 1901.

Q. Car number 27,941?

A. Joliet, Illinois.

Q. Now what do you say as to dates of year in which those cars left the company's possession?

A. All these movements were made in 1902, with the exception of car New York Central, 14,035, which was delivered to the L. S. & M. S. at East Buffalo, December 20th, 1901.

Q. What do you say, Mr. Williamson, as to whether the car movements as recorded in the records to which your attention has been called are or are not fairly illustrative of the general course of business in the handling of the company's freight cars?

A. The cases cited are fairly illustrative.

Q. State to the Comptroller what the general or uniform custom is, if there is such, with reference to general service freight cars, as to their return when they have reached the destination for which they left the possession of the owning company?

A. It is not the common practice to return cars empty—they are ordinarily used for loading either at the point at which made empty, or some adjacent point, and worked home in that way.

Q. And who determines about how these cars shall be used

73 when thus in the hands of a company other than the owner?

A. There are certain general rules for the handling of foreign equipment, but as it works out practically the control of the cars is entirely in the hands of the line upon which they are located.

Q. The company has for the time the possession of them?

A. Exactly.

Q. By what method is the owning company advised when its cars pass from the possession of one foreign company to another?

A. It is the practice of practically all of the railroads of the United States to report delivery of cars to owners; that is, when one road turns over a car to another they report to owner of that car the date of delivery and the line to which delivered.

Q. To illustrate, is this fairly illustrative of what you mean—if a car of the New York Central was in the possession of the Canadian Pacific and that company had lading for point on Oregon Short Line, and should load the car and transfer it to the Oregon Short Line Company in the ordinary course of business the Canadian Pacific would at once report that delivery to the New York Central?

A. They would.

Q. And in turn, as the Oregon Short Line would in the course of transportation, or otherwise, deliver that car to another company—for instance, the Union Pacific—the Oregon Short Line would report that delivery to the New York Central?

A. They would, provided it was a New York Central car.

Q. What are the customary methods, if there are such, that the owning company resorts to or avails itself of as a means of insuring delivery back to it of its cars in the hands of other companies; that is to say, is there a recognized time at which they have a right to
74 demand such return, and if so what is it and what are the methods of enforcing compliance with it?

A. As a general rule, the railroad companies rely upon the so-called per diem charge to effect return of their cars, or at least movement of them, this charge being twenty cents per car per day up to thirty days; but the owning line has a right to serve a penalty notice on any road which holds a car over twenty days, and if the car is not delivered off the line on which this penalty notice is served in the next ten days, the holding road then becomes responsible for a penalty rate on that car of one dollar per day.

Q. That is, eighty cents in addition to twenty?

A. In addition to twenty.

Q. And how is this notice given?

A. Given by the prescribed printed form under the rule of the American Railway Association.

Q. And how generally are these rules or customs that you have spoken of observed by the railroads of the country?

A. They are very generally observed.

Q. You have spoken of the charge per diem for cars held by companies other than the owning company,—how long has that been the method of charge for such cars?

A. Since July 1st, 1902.

Q. And prior to that time what was the basis of charge?

A. Prior to that time the basis of charge was mileage made at agreed rates.

Q. And what was the customary form of reporting that mileage made—was it in such form as to give specific numbers of cars, or merely a lump for mileage stated as the mileage made of cars of the owning company upon the reporting company's road for a given time?

A. It was the practice to report a lump sum representing the mileage of certain company's cars each month, but at the re-
75 quest of the owning companies in some cases the mileage of certain series of cars was given separately if it was so desired, but in a lump sum not individual car numbers.

Q. Where this report of the mileage of certain series of cars was made separately, as you have stated, what was the occasion for that?

A. It might be that a certain line of stock cars were under lease or some special arrangement in connection with a certain series of cars.

Q. By which do you mean it became necessary for the lessee company to know just what mileage those cars was to be reported to them?

A. Exactly.

Q. What is the usual custom with reference to coal cars, particularly with them in this respect, different from general service freight cars, as to their being returned empty?

A. Well, coal cars, of course, as a general proposition, are wanted at the mines for loading, so those cars are not used in the same general way that box cars are, but they are returned for loading either on the rails of ow-ing road, or some coal connection.

Q. In what State are the coal cars of the New York Central operated by it loaded?

A. Principally in Pennsylvania.

Q. What is the fact as to whether a considerable percentage of the cars of this company loaded upon or adjacent to its Pennsylvania lines pass at Newburry Junction from the lines of this company to other lines and thus on to their destination without going in the State of New York at all?

A. I cannot give a percentage figure, but certainly a very large number of cars are so handled.

Q. Carrying coal to tidewater via routes other than the Central Company's routes from Newburry Junction?

76 A. Or to points on southern lines other than tide.

Q. Are you able to state approximately the percentage of this company's cars, freight cars, which were used off of its lines during the tax year in question, ending October 31st, 1902?

A. My recollection is something over sixty per cent.

By Mr. MERRILL:

Q. Mr. Williamson, what do you mean when you say that sixty per cent, of freight cars of the New York Central and Hudson River Railroad Company are used outside the State of New York?

A. I mean that if at any time you were to make a count of the freight cars of the New York Central and dividing them, those in the State and those out, that out of every hundred cars you would find about sixty outside the State of New York; that condition would be generally true.

Q. That is, that during the year sixty per cent. of their equipment would be off outside the State all the time?

A. Yes, sir.

Q. Well, you don't mean to say that sixty per cent. of equipment of the New York Central and Hudson River Railroad Company is continuously and exclusively outside the State of New York?

A. I don't mean to say that any particular car is continuously and exclusively outside the State of New York, but I mean to say

that on an average about sixty per cent. of total equipment is outside the State of New York.

Q. Relatively what part of equipment of people in connection with whom they do transportation business is in the State of New York, in hands of New York Central and Hudson River Railroad Company, to take place of this other equipment?

77 Objected to by counsel, on the grounds that it is incompetent, irrelevant and immaterial.

Objection overruled; exception taken.

A. Well, I can't say as to that.

Q. Well, is it not a fact that there is a great deal of such equipment here upon the lines of New York Central Railroad Company at all times?

Same objection; same ruling; exception.

A. It is a fact that we handle a considerable number of foreign cars at all times.

Deputy Comptroller TIMERMAN: I will ask to have you furnished a statement of the cars of outside railroads that are on this road, on the New York Central lines in place of this last answer, in which you state you couldn't definitely answer the question.

Counsel answers for the witness that the company will undertake to furnish such information, if practicable to obtain it, but objects to the subject matter called for by the question, objects to it being received in evidence on the ground that it is incompetent, irrelevant and immaterial to the questions here under consideration.

Objection overruled; exception.

Deputy Comptroller TIMERMAN: I would also like to ask for a copy of the rules you mention that govern this subject between railroads?

By COUNSEL: Yes, sir.

By COUNSEL: Now, I wish to offer in evidence the Constitution of Massachusetts, Part 2, Chap. 1, Sect. 1, Art. 4; also the statutes of Massachusetts, Chapter 13, entitled "The Taxation of Corporations" and the "Taxation of Corporate Franchises." That is

78 to say, on page 128, Public Statutes of Massachusetts, of 1882, page 128, is where this chapter begins and has this title. Now, on page 138, under the subject entitled "Taxation of Corporate Franchises" section 38, on page 139 of the same volume, section 39 and section 40 on page 140 of the same volume, section 42 on page 142 of the same volume, sections 53 and 54 on page 143, section 56 on page 144, sections 60, 61, 62; also acts and resolves passed by the general Court of Massachusetts in the year 1900 in volume entitled that, at page 464, Chapter 468, "An Act to authorize the lease of the Boston and Albany Railroad to the New York Central and Hudson River Railroad Company, sections 1 and 11 of that act.

The above received and marked "Exhibit C-1 for identification."

By COUNSEL: I offer in evidence also the decision of the Supreme Judicial Court of Massachusetts, Attorney-General against Bay State Mining Company, 99 Mass. 148. I also offer in evidence the de-

cision of the case, first, in the Circuit Court, I am not able to give volume of it now—that is, United States Circuit Court, and the review of that decision in the Supreme Court of the case of the Western Union Telegraph Company against Massachusetts, reported in 125 U. S. 530.

By Mr. MERRILL: I object to the admission of this as testimony on the ground that it is immaterial, irrelevant and incompetent, and has no bearing whatever upon the tax laws of the State of
79 New York, or the operation of such tax laws. That the laws of Masaschusetts or any other State cannot reach over into and operate under the laws of the State of New York, because such an operation would make their laws extra-territorial.

Deputy Comptroller TIMERMAN: These portions of the Constitution, also the statutes and the decisions, I presume, not having read them, refer to the taxation of franchises in the State of Massachusetts?

By COUNSEL: Yes; that is, they include that. The franchise is not taxed separately as it is here; it is included in the bulk valuation.

By Deputy Comptroller TIMERMAN: Now, do you expect to offer proof of paying franchise tax pursuant to those laws of Massachusetts?

By COUNSEL: It was conceded that our leases require us to pay a tax on leased property, and that includes franchise.

By Deputy Comptroller TIMERMAN: Of course, if you expect to prove payment of a tax, of course, with that agreement I might receive them, but if there is to be nothing offered here on that subject I do not see how the bare laws would be material.

By COUNSEL: I offer the laws themselves for the very purpose of showing what tax they provide for.

By Deputy Comptroller TIMERMAN: The mere provision for the tax I would be inclined to hold as immaterial, unless you agree to state that you expect to supplement it by proof of the actual
80 imposition of the franchise tax and the collection thereof.

By COUNSEL: I could do that, but haven't provided myself with it.

The last offer received and marked "Exhibit C-1, for identification."

By Deputy Comptroller TIMERMAN: The sections of the Constitution and the statutes, together with the decisions, are excluded for the time being. I reserve the right, however, to receive them if later in the testimony it appears that a tax was actually paid on the franchise of the New York Central and Hudson River Railroad Company, pursuant to these laws.

Exception taken to the exclusion.

By COUNSEL: I now offer the following laws of the State of New Jersey: General Public Laws of 1888, pages 269 to 287, being Chapter 208, entitled "An act to revise and amend 'An Act for the taxation of railroad and canal property,' approved April tenth, one thousand eight hundred and eighty-four." Also General Public Laws of 1888, pages 376, 377, being Chapter 259, entitled "An Act

to amend an act entitled "An act to revise and amend 'An act for the (taxation) of railroad and canal property,' approved April tenth, one thousand eight hundred and eighty-four, which was approved March twenty-seventh, one thousand eight hundred and eighty-eight." Also General Public Laws of 1891, pages 165, 166, being Chapter 98, entitled "A Supplement to an act entitled "An act to revise and amend 'An act for the taxation of railroad and
81 canal property,' approved April tenth, one thousand eight hundred and eighty-four, approved March twenty-seventh, one thousand eight hundred and eighty-eight."

Same objection. Same ruling. Same exception.

Same received and marked "Exhibit D, for identification."

By COUNSEL: I now offer in evidence the Laws of the Commonwealth of Pennsylvania, Session of 1889, Number 332, page 420, entitled "A further supplement to an act entitled 'An act to provide revenue by taxation,' approved the seventh day of June Anno Domini one thousand eight hundred and seventy-nine," page 427, section 19. Also of the session of 1891, number 200, page 229, entitled "An act to provide, etc." At page 233, Section 4 and following, setting forth Section 20 of the act as amended. Also, the same State, session of 1893, number 288, page 353, the title of the act and section 1, setting forth section 21 of the former act as therein amended. Also, session of 1889, number 332, at page 431, section 23, same session laws, page 437, section 31.

Same ruling. Same objection. Exception.

Marked "Exhibit E, for identification."

By COUNSEL: Now, I offer in evidence the decisions of the Courts of Pennsylvania, as follows:

Commonwealth against Susquehanna & Schuylkill R. R. Co., 14 C. C., 440.

Pullman Palace Car Company against Commonwealth, 107 Pa. State, 156 and 141 U. S., 114.

82 Also Commonwealth against D., L. & W. R. R. Company, 145 Pa., 96.

Commonwealth against N. Y., P. & O. R. R. Co., 188 Pa., 169.

Same objection. Same ruling. Exception.

Marked "Exhibit F, for identification."

It is agreed that the evidence offered and the rulings with reference thereto in the proceeding regarding the tax for the year ending October 31st, 1902, shall be regarded and dealt with in the same manner with reference to the proceeding for the tax year ending October 31st, 1903, except so far as regards the evidence with reference to the particular amounts for that year, and except the evidence with regard to the M. D. T. stock, and that subject only to the exception noted in all respects, the same evidence may be regarded as having been offered and dealt with in this proceeding as it was in proceeding for 1902.

It is further stipulated that the figures under the heading "Recapitulation of Distribution of Assets," October 31st, 1903, as shown on the back of the original report herein, shall be accepted as correct, subject only to these exceptions, namely:

First, the figures under the heading "In New York State" as "stocks of other companies," $16,552,269.97, should be reduced by deducting therefrom 63.54 per cent. of $2,597,400.

Second, that of the item under "Outside New York" as "Cost of road and equipment, $19,817,142.24," of this amount $414,540.86 represents an investment outside of New York State other
83 than equipment, the balance, to wit, $19,402,601.38, represents equipment, upon which the applicant claims exemption from the basis of taxation upon the grounds set up by the testimony in the 1902 proceeding, to wit, that $3,148,216.64 thereof represents the average value of equipment employed by the railroad company on its operated lines outside the State of New York, and the other $16,254,384.74 represents the average value of its equipment used on foreign roads outside the State of New York during the said tax year, as testified to in the 1902 proceedings.

It is the same stipulation for 1904 as for 1903, except where you come to accepting that under the head of "Recapitulation of Distribution of assets October 31st, 1904," the item "Cost of equipment outside the State of New York, $19,960,789.08," consists exclusively of equipment, and that the testimony with reference to the same shall be to the effect that $3,513,619.12 was employed on roads operated by the New York Central and Hudson River Railroad Company outside of the State of New York, and $16,447,169.96 thereof was the average of its cars in the use of foreign corporations outside of the State of New York during the said tax year, as indicated in the testimony with relation to the same ground or matter in the proceedings of 1902.

Papers showing car movements in the year ending October 31st, 1904, offered in evidence.

Received and marked "Exhibit G."

By Mr. MERRILL: Is it admitted by counsel for the com-
84 pany that the New York Central and Hudson River Railroad Company is a railroad corporation, transportation company, organized under the laws of the State of New York, and under the laws of no other State?

By COUNSEL: My application says a railroad corporation, incorporated under the laws of no other State.

By Deputy Comptroller TIMERMAN:

Q. As a transportation corporation?

By COUNSEL: Surely.

85 EXHIBITS.

The following, signed by James H. Foulds, Jr., and Frederick Ely Williamson, was furnished in response to inquiry, to wit:

"The Comptroller asks you to furnish a statement of the several dates when the capital stock was issued, and the amounts issued on the several dates of the capital stock of the New York Central and Hudson River Railroad Company, during the year ending October

31st, 1902," and as and for his answer thereto says that the dates of issue of the increase of capital stock of said company during the year ended October 31, 1902, was as follows:

Date issued.	No. of shares.	Date issued.	No. of shares.
April 21st	3,835	Brought forward	168,539
" 22d	3,981	May 27th	24
" 23d	5,659	" 28th	43
" 24th	4,798	" 29th	18
" 25th	5,232	" 31st	10
" 26th	3,799	June 2d	40
" 28th	11,559	" 3d	14
" 29th	7,267	" 4th	61
" 30th	6,451	" 5th	16
May 1st	7,926	" 6th	13
" 2d	19,897	" 7th	9
" 3d	1,230	" 9th	15
" 5th	1,657	" 10th	15
" 6th	2,170	" 11th	9
" 7th	3,520	" 12th	19
" 8th	2,896	" 13th	36
" 9th	12,514	" 14th	6
" 10th	7,585	" 16th	15
" 12th	53,492	" 17th	10
May 13th	1,130	" 18th	35
86 " 14th	137	May 19th	29
" 15th	125	" 20th	11
May 16th	587	" 21st	6
" 17th	38	" 23d	5
" 19th	95	" 24th	41
" 20th	348	" 25th	5
" 21st	406	" 26th	13
" 22d	34	" 27th	20
" 23d	51	" 30th	52
" 24th	18	July 23d	34
" 26th	102		
	168,539	Total	169,163

In response to the inquiry, to wit:

"I will ask to have you furnish a statement of the cars of outside railroads that are on this road, on the New York Central lines, in place of this last answer, in which you said you couldn't definitely answer the question," and as for his answer thereto says:

Our system of car records and accounts does not embrace accounts of foreign cars in the aggregate which may be employed upon our line. It consists of or includes individual car movements and car mileage in the aggregate. Computation of the estimated number of cars thus employed based on the mileage made on our line would indicate that while the number varies very much at different sea-

sons of the year, the average number of foreign cars employed on the New York Central's operated lines within the State of New York during these respective tax years ending October 31st, 1902, 1903 and 1904, were approximately equivalent to the number of
87 this company's cars operated on foreign lines outside the State during each of such tax years.

And in response to the inquiry, to wit:

"I would also like to ask for a copy of the rules you mentioned that cover this subject between railroads, and for his answer thereto says: The paper hereto attached marked "Exhibit 1," is a correct and complete copy of the rules mentioned.

88 EXHIBIT 1.

The American Railway Association.

CODE OF
CAR SERVICE RULES
AND
CODE OF
PER DIEM RULES
GOVERNING SETTLEMENT FOR THE USE OF
FREIGHT CARS.

CODE OF
CAR SERVICE RULES
ADOPTED OCTOBER 24, 1900;
WITH AMENDMENTS AGREED TO APRIL 24, 1901,
OCTOBER 23, 1901, OCTOBER 28, 1903,
AND APRIL 5, 1905.

7 RULES.

Foreign cars must be promptly returned to the home roads.*

2. Foreign cars may be properly used as follows:

(*a*) Loaded to points on or reached by using the home road.

(*b*) Loaded to intermediate points in the direction of the junctions at which they were received.

(*c*) If returned empty they should be moved over the routes by which they were received.

89 3. Foreign cars may be sent empty in the direction opposite to the junctions at which they were received, for loads to points on or reached by using the home roads, but not otherwise.

Foreign cars must not be sent empty to connecting roads without the permission of the owners, except for switching service. Loaded or empty cars received for switching service must be confined to switching limits, and returned to the home or the delivering road.

*NOTE.—Whenever the words "home road" are used in these rules they refer to "The road which owns a car, or upon which the home of a private car is located."

When empty foreign cars are delivered by one line to a connection for return loading via the road making the delivery, they must be so loaded and returned.

Rule 3. See page 12.

4. If loaded foreign cars on their return movements are re-consigned and such reconsignments would cause diversions of the cars, the lading must be transferred under the rules governing transfers at points of diversion, if this can be done without injury to it, and the cars must be returned to the owners or to the roads from which they were received. In case the lading is of such a character that it cannot be transferred without injury the cars may be run through as re-consigned, but the facts of the case must be promptly reported to the owners of the cars.

5. Cars shall be considered as having been delivered to a connecting railroad when placed upon the track agreed upon and designated as the interchange track for such deliveries, accompanied or preceded by proper data for forwarding and accepted by the car inspector of the receiving road.

Unless otherwise arranged between the roads concerned, the receiving road shall be responsible for the cars, contents and Per Diem after receipt of the proper data for forwarding and until they have been accepted by its inspector or returned to the delivering road.

6. The following rates per train mile, of actual distance for any trains using other lines in avoiding washouts or other obstructions, shall be in force unless otherwise arranged between the roads concerned:

Fifty cents per train mile for either a passenger or a freight train handled by its own engine and crew, together with the actual cost of pilotage, and with fuel and incidental supplies, at cost plus ten per cent., and water at fifty cents per tank; in case the engine and crew are furnished by the line whose track is used, the charge shall be one dollar per train mile, with no charge for fuel, water and engine supplies.

The road for which the train is detoured shall pay the regular Per Diem and mileage to the owners of the cars in the train, including the road owning the track, if any of its cars shall be in the detoured train. All mileage charges shall be at actual distance over the detoured route.

7. The following rates for the use of passenger equipment shall be in force unless otherwise arranged between the roads concerned.

(A) The rate for coaches, dining cars, chair cars, parlor cars, combined passenger cars and postal cars, shall be 3 cents per mile of actual distance; and for baggage, express, mail storage, combined baggage-express, combined baggage-mail, and combined baggage-mail-express cars, 1½ cents per mile of actual distance. These rates are to apply when the owners of the cars participate in the business and not when the cars are hired to other lines.

(B) The per diem rate for coaches, dining cars, chair cars, parlor

cars, combined passenger cars and postal cars, hired at other
91 than mileage rates, shall be five dollars per day, and for bag-
gage, express, mail storage, combined baggage-express, combined baggage-mail, and combined baggage-mail-express cars, three dollars per day, subject, however, to agreement between the parties interested.

8. When a per diem rate is charged for the use of passenger equipment, as provided for in Rule 7, the total number of hours of all cars of the same class shall be calculated on a basis of twenty-four hours for each day and the charge made accordingly; any fraction of a day over the aggregate number of days of twenty-four hours each to be counted as one day; it being understood that the minimum charge shall be one day for each car.

When necessary to haul cars empty over the roads owning them, or intermediate roads for delivery to the borrowing roads, the tariff rate for such cars shall be charged the borrowing roads for hauling the cars from the points where they left service to the points of connection with the borrowing roads and return; the charge for
10 the empty haul to be named to the borrowing roads at the time the agreement to loan cars is made.

Rule 8. See page 12.

9. The car service charge for delay in loading or unloading a freight car shall be one dollar a day after forty-eight hours from the time of delivery of the car for loading or unloading, not including Sundays or legal holidays, except where rates are fixed by Statute or local Car Service Associations.

Proper notice shall be provided in bills of lading, tariffs and expense bills, notifying shippers and consignees of the charge.
92 Charges for the delay of cars shall not be refunded except on the approval of the transportation officer designated by each road; at points where Car Service Association Rules are in force such additional regulations shall prevail as those rules may provide.

10. When any freight car is detained on a road by reason of a railroad error, the Car Service charges which may have accrued against shipper or consignee during the time such car is held awaiting proper data shall be cancelled; and the erring road shall pay to the road holding the car for the time the car is held until sufficient data is received to release it, the rate established by the Per Diem Rules for freight cars.

Where car service associations exist, the facts in the case shall be certified to the road upon which the Per Diem accrues by the manager of the Car Service Association, the claim against the erring road being made direct by the holding road.

11. New freight cars shall be stenciled when built with actual light weight, date of weighing and capacity. Steel cars shall be reweighed and re-stenciled within the first year thereafter and wooden cars at the end of the first and second years.

All cars which have received general repairs shall be
11 weighed and stenciled, with the actual weight, immediately before being put back into service.

Any car without stenciling shall be immediately weighed and

stenciled. New weights of foreign cars shall be reported to car owners.

12. The maximum excess allowed over the marked capacity of freight cars shall not exceed 10 per cent. of such marked capacity.

93 13. The placing of advertisements or placards of any kind by shippers upon freight cars is prohibited.

12

QUESTIONS.

ON VARIOUS POINTS UNDER THE CAR SERVICE RULES AND DECISIONS OF THE COMMITTEE ON CAR SERVICE WHICH HAVE BEEN APPROVED BY THE ASSOCIATION.

RULE 3.

"Will you kindly advise me whether it is the intention to allow railroad companies to take switch cars and move them out on their lines for loading to owners? Rule 3 of the Code of Car Service Rules, adopted October 24th last, does not discriminate between switch cars and those received in through business."

In answer to this question the Committee's reply is "No."—*October* 23, 1901.

"Referring to the first paragraph of Rule 3 in the Code of Car Service Rules adopted by The American Railway Association October 24, 1900, which reads as follows:

"Foreign cars may be sent empty in the direction opposite to the junctions at which they were received for loads to points on or reached by using the home roads, but not otherwise."

"Will you kindly advise me your construction of this rule? Do the closing words 'but not otherwise' prevent the loading of a car in an opposite direction for the purpose of securing a load to points on or reached by using the home road, while permitting the cars to be sent empty for the same purpose?"

In reply to this question the answer of the Committee is that *it does.*—*October* 23, 1901.

RULE 8.

"In paying the per diem for cars under the provisions of Rule 8, is it the intention of the Committee that the aggregate number of hours of all cars hired to another line from time to time during a current month, or any other period for which bill is rendered, should be taken and divided by the aggregate number of hours by

94 twenty-four to find the number of days and fractions thereof for a basis of settlement; or is it the intention of the Committee to make charges and settlement on a basis of each individual car?"

Answer.—Rule 8 provides that, "the total number hours of all cars of the same class shall be calculated on a basis of twenty-four hours for each day and the charge made accordingly;" and it is, therefore, not the intention of the Committee to have charges and settlements made on a basis of each individual car.—*October* 23, 1901.

13

CODE OF

PER DIEM RULES

GOVERNING SETTLEMENT FOR THE USE OF FREIGHT CARS.

IN EFFECT JULY 1, 1905.

ADOPTED APRIL 24, 1902;
WITH AMENDMENTS AGREED TO OCTOBER 28, 1903,
APRIL 27, 1904, OCTOBER 26, 1904,
AND APRIL 5, 1905.

14

PER DIEM RULES AGREEMENT.

The subscribing railroad company promises and agrees with each railroad company severally which heretofore or hereafter may have subscribed and filed a like agreement with the Secretary of The American Railway Association, that the subscriber will abide by the rules governing settlement for the use of freight cars, as adopted by the Association and designated "Per Diem Rules" on the
95 minutes of its proceedings; this agreement to continue until withdrawn by three months' previous notice in writing to the Secretary of the Association.

15

DEFINITIONS.

HOME CAR.—A car on the road to which it belongs.

FOREIGN CAR.—A car on a road to which it does not belong.

PRIVATE CAR.—A car having other than railroad ownership.

HOME.—A location where a Car is in the hands of its owner.

HOME ROAD.—The road which owns a car, or upon which the home of a private car is located.

HOME ROUTE.—The line of intermediate roads over which a foreign car was moved from home.

HOME JUNCTION.—A junction with the home road.

HOME ROUTE JUNCTION.—A junction on the home route.

SWITCHING SERVICE.—The movement of a car to be loaded or unloaded, or the movement of a car between railroads, at a charge for the service rendered within designated switching limits, the road performing the service not participating in the freight rate.

17

PER DIEM RULES.

GOVERNING SETTLEMENT FOR THE USE OF FREIGHT CARS.

For Interpretations, see pages 22 to 25.
For Decisions, see pages 26 to 104.

1. The rate for the use of freight cars shall be 20 cents per car per day which shall be paid for every calendar day, and shall be known as the per diem rate.

RULE 1.—See Interpretation No. 25.

96 2. Days shall be reckoned by subtracting the date of receipt from the date of delivery. The day of receipt should be disregarded, and payment made for day of delivery.

A road receiving and delivering a car on the same date shall not pay the Per Diem for that day.

RULE 2.—See Interpretation No. 9.

3. A road shall have the right to demand the return of its car after it has been twenty days consecutively on any road. If the car is held by the road more than ten days after the date of such notice on the prescribed form (L), making thirty days in all, thereafter a penalty rate of 80 cents per day in addition to the per diem rate shall be paid by such road for the further use of that car.

RULE 3.—See Interpretations Nos. 10, 12, 13, 14, 15, 16, 20, 25 and 26, and Decisions Nos. 15 and 22.

4. All railroads, including ferry lines, shall be responsible to the car owner for amounts accruing for the use of a car at the established rates, whether such car is in road service or switching service, until the car has been delivered to the owner or to another road.

RULE 4.—See interpretations Nos. 5 and 25, and Decisions Nos. 1, 16 and 17.

5. An arbitrary amount for each car in switching service may be reclaimed by the switching line from the road for which the service was performed. This amount shall be based upon the aver-

18 age number of days actually required and determined by the roads directly interested for each local territory.

RULE 5. See Interpretations Nos. 7, 11, 18 and 19, and Decisions Nos. 6, 8, 9, 10, 12, 13, 14, 18, 19, 20, 21 and 23.

6. In case a road delivers an empty foreign car without the consent of the owner to a road which does not pay Per Diem; or if a road permits the loading or re-consigning of a foreign car without

97 the consent of the owner to such road it shall be responsible to the owner for the payment of an amount equal to the Per Diem accruing on the car while on such road.

In case the road so delivering or authorizing the delivery of a foreign car connects directly with the road which does not pay per Diem, penalty shall accrue as if delivery had not been made.

RULE 6.—See Interpretation No. 6 and Decision No. 13.

7. When home route cards have been requested under the Master Car Builders' Rules, the Per Diem hall cease from the date of request to owner.

When a car has been destroyed and reported under the Master Car Builders' Rules the Per Diem shall cease from the date of notice to owner.

RULE 7.—See Interpretations Nos. 4 and 8 and Decision No. 5.

8. When a car is detained awaiting the receipt of repair material from its owner, the Per Diem shall cease from the date the necessary material is ordered from the owner until the date when it is received by the road holding the car.

RULE 8.—See Interpretations Nos. 12, 13, 17 and 21.

9. The Interchange Reports shall close at midnight, and shall

include all cars exchanged upon the date named unless otherwise noted thereon. The reports must be sent to the car record office on each day whether cars are exchanged or not.

In cases where there are different standards of time at junction points the time of the more easterly reckoning shall be used.

19 The Interchange Reports to the car record office from Junction points must be signed by the agents or other authorized representatives of both roads on the prescribed form, the receipt of cars delivered being thereby acknowledged. Car Service Rule

98 5 governs the delivery of cars.* The time of delivery of cars upon interchange tracks of connecting lines shall, *prima facie*, be the time given by the delivering roads.

RULE 9.—See decisions 2, 4 and 7.

10. The Junction Report for each day will be made to car owners on the prescribed form (D) as promptly as possible after the receipt of the Interchange Report for that day.

11. Within thirty days after the end of each calendar month, car owners shall be furnished with a Per Diem Report for that month, on the prescribed form, showing the number of days each car has been in service upon the road making the report.

Statements of corrections or omissions in Per Diem Reports must be presented within one year from the date when the Per Diem report to which they relate has been received. This will not prevent the continuance of any case after the period named, if it has been previously opened, even though the claim should eventually rest upon some road other than the one originally addressed.†

RULE 11. See Interpretations Nos. 1, 2, 3 and 9.

20 12. The settlement of amounts accruing for the use of cars and reclaims under Rule 5 shall be made monthly without regard to reclaims pending under Rules 13, 14 and 15.

12. The settlement of amounts accruing for the use of cars and reclaims under Rule 5 shall be made monthly without re-

99 *gard to reclaims pending under Rules 13, 14 and 15.*

13. When reclaims are made for allowances, under Rules 14 and 15, or on account of special conditions, they must be made by the designated transportation officer of the road which pays the Per Diem to the designated transportation officer of the road from which the allowance is reclaimed.

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*Car Service Rule 5.

5. Cars shall be considered as having been delivered to a connecting railroad when placed upon the track agreed upon and designated as the interchange track for such deliveries, accompanied or preceded by proper data for forwarding and accepted by the car inspector of the receiving road.

Unless otherwise arranged between the roads concerned the receiving road shall be responsible for the cars, contents and Per Diem after receipt of the proper data for forwarding and until they have been accepted by its inspector or returned to the delivering road.

†This paragraph will not apply to statements bearing on amounts accruing prior to July 1, 1905.

14. A road failing to receive promptly from a connection cars upon which it has laid no embargo shall be responsible to the connection for the Per Diem on cars held for delivery, including the home cars of such connection.

If such failure to receive shall continue for more than three days, the delinquent line shall thereafter in addition be responsible for the Per Diem on all cars wherever in transit which are thus held back for delivery.

It shall be the duty of a connection intending to reclaim such Per Diem allowance to notify the delinquent line daily of the total number of cars so held for it, and when required, to furnish the initials and numbers of the cars.

RULE 14.—See Interpretations Nos. 20, 23 and 24, and decisions Nos. 3, 11 and 26.

15. When a road gives notice to a connection that for any reason it cannot accept cars in any specified traffic, thereby instituting an embargo, it should receive cars already loaded with such traffic at the time such notice is issued. If it does not receive such cars the road holding them may reclaim Per Diem from the road placing the embargo for the number of days such cars are held not exceeding the duration of the embargo.

100 After the date of the notice a road must not load or reconsign cars in such traffic to the road issuing the notice.

All such notices must be given by telegraph, by the embargoing road, to its immediate connection and by it transmitted as

21 may be necessary.

RULE 15.—See Interpretations Nos. 20, 22 and 23.

16. These rules shall not apply to private cars.

17. To interpret these rules and to settle disputes arising under them an Arbitration Committee of five members shall be appointed by the Committee on Car Service. Three members of the Arbitration Committee shall be a quorum.

In case any question or dispute arises under these rules it may be submitted to the Arbitration Committee through the Secretary of the Association in abstract. The abstracts shall briefly set forth the points at issue and each party's interpretation of the rules upon which its claim is based. The Arbitration Committee shall base its decisions upon the rules and the abstracts submitted, and its decisions shall be final. Should one of the parties refuse to furnish the necessary information the Arbitration Committee shall use its judgment as to whether it can properly decide. All decisions shall be reported to the Association through the Committee on Car Service.

In case a question shall arise not covered by the rules the roads disagreeing may, by mutual consent, submit such questions to the Arbitration Committee.

The Committee on Car Service may appoint a secretary for the Arbitration Committee, who shall be paid by the Association. The other expenses of the Arbitration Committee shall be divided equally between each of the parties to the dispute and the Association.

101 The minimum charge to each road shall be $10, payable in advance. The expenses shall be first paid by the Association

and then billed to the parties concerned by the Treasurer of the Association.

22 *Interpretations of the Code of Per Diem Rules Rendered by Arbitration Committee.*

Question No. 1. A foreign car received and delivered the same day, should it appear on the Per Diem Report or not?

Answer. The car should be reported by car number as having earned no Per Diem.

Question No. 2. A foreign car received July 31st and delivered to a connection August 5th, should it appear on July Per Diem Report?

Answer. Car number need not appear on July report.

Question No. 3. A foreign car received July 26th and delivered to a connection August 5th, should it show five days in July Account and five days in August account?

Answer. Yes.

Question No. 4. (*Note.*—Refers to rule in effect prior to January 1, 1904.)—If a road has a foreign car in a general worn-out condition, and under the Master Car Builders' Rules asks the car owner for proper cards to move the car home, are they responsible for the Per Diem during the time they are holding car for these cards, or would it be proper to construe Rule 7 as meaning that Per Diem will cease from the date that correspondence commences with the owner as to whether car will be repaired or returned to owner?

Answer. The words "When a car has been destroyed, or so damaged as to require an appraisement," in Rule 7 refer to cars
102 actually destroyed or condemned to be destroyed, and Per Diem should be paid on all other bad order cars.

Question No. 5. Should new cars en route from builder to owner, empty or loaded, be exempt from Per Diem?

Answer. Yes.

Question No. 6. Is a road responsible to the owner of a foreign car which they deliver to a road which does not pay Per Diem, while on that road, unless it receives from the owner of the car a
23 notice to the effect that their cars are not permitted to go on roads which do not pay Per Diem?

Answer. The road would be responsible for the Per Diem, and it is not necessary for the car owner to issue notice to that effect.

Question No. 7. Is a switching line entitled to reclaim the allowance on its own cars when tendered to it to be switched on account of another line?

Answer. A road cannot reclaim the allowance for the use of its own cars.

Question No. 8. Should Per Diem be allowed on freight cars in July that were totally destroyed in June but not reported to car owners until after July 1st?

Answer. Yes.

Question No. 9. Should Per Diem be paid on cars for July 1, 1902, that were on hand 12.01 A. M., July 1, 1902?

Answer. Yes.

Question No. 10. In case a car is received on the first day of the month, can penalty notice for return of car be dated on the 21st of that month, or must it be dated later?

Answer. Notice may be dated on the 21st.

Question No. 11. Does Rule 5 apply to cars that were in
103 switching service at 12.01 A. M., July 1, 1902?

Answer. Yes, unless otherwise specially agreed. The amount of reclaim is in the hands of the roads interested in each local territory.

Question No. 12. If a road receives a car on the first day of the month; damages it and orders material from owner on the 25th; material is received on the 20th of the following month; penalty notice is served by car owner on the thirtieth day after its receipt, or five days after material is ordered: When should road holding car commence paying the penalty rate?

Answer. Penalty notice takes effect in this case on receipt of material and penalty rate begins ten days thereafter.

Question No. 13. If a road receives a car on the first day
24 of the month; damages it and orders material from owner on the 11th; material is received on the 30th; on the twenty-fifth day after car is received penalty notice is served by car owner: Is this demand for penalty legal or are the rules for the collection of penalty suspended the same as they are for the Per Diem?

Answer. Demand for penalty is legal, but does not take effect in this case until ten days after the material is received and penalty rate begins twenty days after material is received, as delay to car while awaiting material should not be computed.

Question No. 14. (*Note.*—Refers to rule in effect prior to January 1, 1905.) If a road sends a penalty notice demanding a return of one of its cars, and before the ten days expire, the road having possession of the car delivers it to a road which does not pay Per
104 Diem, does this delivery release it from the penalty for which the notice has been given?

Answer. Yes.

Question No. 15. (*Note.*—Refers to rule in effect prior to January 1, 1905.) In case a road has a foreign car for which it is liable for the $1.00 per day, would the delivery to a road which does not pay Per Diem stop the penalty of eighty cents a day?

Answer. Yes.

Question No. 16. Should the penalty rate accruing on a car on a road which does not pay Per Diem be paid by the road responsible for the Per Diem on that car?

Answer. Yes.

Question No. 17. Referring to Rule 8, should Per Diem be paid for date material is ordered, or for date on which material is received?

Answer. For date received.

Question No. 18. If a road handles a car between the junction of another road and a point on its line in a switching district under a

special switching arrangement with the shipper or consignee;
25 under such circumstances is the switching road entitled to a reclaim on the long haul road for the agreed allowance at that point?

Answer. No.

Question No. 19. Does Rule 5 apply when switching charge is assessed on a ton instead of a car basis?

Answer. Yes.

Question No. 20. Under Rules 14 and 15, is the railroad which fails to accept cars responsible for penalty rate as well as the Per Diem Rate?

Answer. Yes.

105 Question No. 21. Referring to Rule 8; when repair material is ordered, should the car numbers be sent to owner of the car if Per Diem is to be waived?

Answer. Yes.

Question No. 22. Under Rule 15 can a road reclaim Per Diem on its own cars?

Answer. Yes.

Question No. 23. In case a car held under Rules 14 or 15 for a certain road, is not delivered to that road, can reclaim be made against such road?

Answer. No.

Question No. 24. Under Rule 14, can the expression "and, when required, to furnish the initials and numbers of the cars," be interpreted to mean that a daily list shall be made which shall include initials and numbers of cars previously reported?

Answer. No.

Question No. 25. Under Rules 1, 3 and 4 must the Per Diem and penalty rate be paid by a road for the "use of a car, when it is out of repair, unfit for service, or lying idle?

Answer. Yes.

Question No. 26. Under rule 3 and Interpretation No. 20 can penalty be collected by the owner road on its own cars when held for connecting line under Rule 14?

Answer. No.

106 Mr..... .....

.....R.....

.....

Form No. (D)

North & South Railroad.

Junction Report of Cars Delivered to Our Connections.

On.....*190*...

(Printed Signature)
.....

(Title of Officer)
.....

(Address)
.....

x Loaded. — Empty.

Car.		x —	Delivered to (Full Initials)
Full initials.	Number.		

☞ NOTE.—Standard size, 3¼ x 5½ inches, including margins.

107

Form No. (L).

NORTH & SOUTH RAILROAD.

Penalty Notice.

(Address and Date.)

..... 190....

Mr. .....

.....

.....

Cars of this Company as enumerated below have been on your line 20 consecutive days and you are hereby notified that unless same are disposed of within 10 days from this date, a penalty of 80 cents per car per day, in addition to the regular per diem rate, will be charged for these cars.

(Printed Signature.)

.....

(Title of Officer.)

.....

Retain original; return copy.

Check.	Car.			Delivered.		Reply.		
	Initials.	Kind.	Number.	By or at.	Date.	Location.	Disposition.	Date.
1								
2								
3								
4								
5								
6								
7								
8								
9								
10								
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☞ NOTE.—Standard sizes 8 x 10½ and 5 x 8 inches, including margins. Penalty notices should be printed in bright red ink on any color or quality of paper that each road may prefer.

Penalty notices must be mailed in duplicate, the original to be retained by the receiving road; the copy to be returned as an acknowledgment, and bearing notations showing dispositions made of the cars which may have cleared the lines of the receiving road.

No other styles of penalty notices will be used, either of different sizes, different styles or by postal card.

All Penalty notices should be mailed in an envelope bearing the full and complete address, (name, title road, town and state) of the officer to whom sent.

Preferably, Penalty notices should be sent by U. S. Mail only, although in the case of immediate and direct connections, they may be forwarded by Railway service.

EXHIBIT "A" FOR IDENTIFICATION.

New York Central Capital Stock Tax 1902.

Total Assets	$339,316,025.89
Average Capital Stock at Par	123,458,180.00
Average Cash Value	200,156,525.69

Assets Employed.		Capital Stock at Par.		Capital Stock Cash Value.		Tax.
In N. Y. State.	Outside of N. Y. State.	In N. Y. State.	Outside of N. Y. State.	In N. Y. State.	Outside of N. Y. State.	
		Revised Statement.				
227,856,175.92	131,459,849.97	78,289,583.32	45,168,596.68	126,926,986.95	73,229,538.74	190,390.48
		Add 89 % of M D T Stock:				
2,311,686.00		794,227.06		1,287,721.68		1,931.58
		As per Report:				
230,167,861.92	129,148,163.97	79,083,810.38	44,374,289.62	128,214,708.63	71,941,817.06	192,322.06
		Add outside equipment:				
On System 4,780,862.98		1,642,666.78		2,663,173.52		3,994.76
On Foreign Rds. 11,865,528.08		4,076,901.79		6,609,677.01		9,914.52
		Report and Equipment:				
246,814,252.98	112,501,772.91	84,803,428.95	38,654,721.05	137,487,559.16	62,668,966.53	206,231.34
		Add unexplained addition.				
3,593,804.09		1,234,802.74		2,001,923.90		3,002.89
		Basis of Taxation:				
250,408,057.07	108,907,968.82	86,038,231.69	37,419,918.31	139,489,483.06	60,667,042.63	209,234.23

OTTO KELSEY, AS COMPTROLLER, ETC.

109 EXHIBIT "B."

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6/5, 1905.

.....

.....

DEAR SIR: Below please find movements of N. Y. C. .....
Car number 90110, from Lockport to Oklahoma City.

C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
					M		
Rec'd from							
From Lockport	9	30	'02		M		
To M. C.	10	1	"		M		
To C. Belt	10	3	"		M		
To C. & Alton	10	5	"		M		
To W. Ferry Co.	10	3	"		M		
To Mo. Pac.	10	8	"		M		
To A. T. & S. F.	10	10	"		M		
To 'Frisco System	10	17	"		M		
To Terminal R.R.	11	3	"		M		
To So. Pac.	11	5	"		M		
To Terminal R.R.	..	..	"		M		
To Big Four	11	11	"		M		
To L. S. & M. S.	11	13	"		M		
To N. Y. C.	11	19	"		M		
Del'd to							

110 EXHIBIT "B-1."

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6/5, 1905.

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.....

DEAR SIR: Below please find movements of N. Y. C. .....
Car number 31772 from Schenectady to Clearwter, S. C.

C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
					M		
Rec'd from							
From Schenectady	3	6	'02		M		
To Canandaigua	3	8	"		M		
To P. R.R.	3	8	"		M		
To Wash. South	3	10	"		M		
To R. F. & P.	3	11	"		M		
To South. Ry.	3	11	"		M		
To N. & W.	4	10	"		M		
To P. & R.	4	13	"		M		
To Erie	5	21	"		M		
To N. Y. C.	7	2	"		M		

EXHIBIT "B-1."

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6/5, 1905.

. . . . . .

. . . . . .

DEAR SIR: Below please find movements of N. Y. C. . . . . Car number 56491, from Weehawken to Berlin, Ont.

C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from					M		
From W'k'n	3	17	'02		M		
To Susp. Bridge	3	20	"		M		
To G. T.	3	20	"		M		
To M. C.	4	3	"		M		
To L. S. & M. S.	4	6	"		M		
To N. Y. C.	4	16	"		M		

111 EXHIBIT "C."

EXHIBIT "4" AND EXHIBIT "C" FOR IDENTIFICATION.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK *Jan. 16th*, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 41278 from C. H. EWINGS, Car Acc't.

FROM	TRAIN.	DATE.	TIME.	TO	L. OR E. DATE.	TIME.	CON.
N. Y. Central		4/19		Mich. Central		4/19	
Mich. Central		5/10		L. S. & M. S.		5/10	
L. S. & M. S.		6/6		Vandalia		6/6	
Vandalia		6/13		L. S. & M. S.		6/13	
L. S. & M. S.		6/24		Pere Marquette		6/24	
Pere Marquette		7/16		Mich. Central		7/16	
Mich. Central		7/18		Pere Marquette		7/18	
Pere Marquette		7/20		Mich. Central		7/20	
Mich. Central		9/21		Penn. Company		9/21	
Penn. Company		10/17		L. S. & M. S.		10/17	
L. S. & M. S.		10/31		Pitts. & Lake Erie.		10/31	
P. & Lake Erie.		12/8		Penn. R.R.		12/8	
Penn. R.R.		12/9		Penn. Company		12/9	
Penn. Company		12/12		Erie		12/12	
Erie		12/17		Clev., Cinn., Chic. & St. L.		12/17	

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *January* 16*th*, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 41038 from C. H. EWINGS, Car Acc't.

FROM	TRAIN. DATE. TIME.	TO	L. OR E. DATE. TIME. CON.
N. Y. Central	4/28	L. S. & M. S.	4/28
L. S. & M. S.	5/8	Lake Erie & West	5/8
L. E. & Western	5/20	L. S. & M. S.	5/20
L. S. & M. S.	6/2	Grand Trunk	6/2
Grand Trunk	6/19	Mich. Central	6/19
Mich. Central	7/26	Chic., Milw. & St. P.	7/26
Chic., Milw. & St. P.	7/29	Mich. Central	7/29
Mich. Central	8/26	Chic. Junction	8/26
Chic. Junction	8/31	Mich. Central	8/31
Mich. Central	10/10	Chic., Rock I. & Pac.	10/10
C., R. I. & Pac.	10/14	Missouri Pac.	10/14
Mo. Pac.	10/20	C., R. I. & Pac.	10/20
C. R. I. & Pac.	11/27	Chicago, Peoria & West.	11/27
Chicago, Peoria & West.	11/29	Chic. R. I. & Pac.	11/29
C. R. I. & Pac.	12/1	Ind. Ill. & Iowa	12/1
I. I. & Iowa	12/2	N. Y. Chic. & St. L.	12/2
N. Y. C. & St. L.	12/5	Lehigh Valley	12/5
Cent. of N. J.	1/2	Penn. Railroad	1/2
Lehigh Valley	12/7	Cent. of New Jersey	12/7
Penn. R.R.	1/9	Washington South	1/9

112 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *Jan.* 16*th*, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 59578 from C. H. EWINGS, Car Acc't.

FROM	TRAIN. DATE. TIME.	TO	L. OR E. DATE. TIME. CON.
N. Y. Central	4/2	L. S. & M. S.	4/2
L. S. & M. S.	4/17	Lake Erie & West	4/17
L. E. & Western	5/8	Cin. Ham. & Dayton	5/8
Cin. Ham. & Dayton	5/20	L. S. & M. S.	5/20
L. S. & M. S.	5/23	Mich. Central	5/23
Mich. Central	6/4	Erie	6/4
Erie	6/15	Mich. Central	6/15
Mich. Central	8/20	Tor. Ham. & Buffalo	8/20
Tor. Ham. & Buffalo	8/21	Mich. Central	8/21
Mich. Central	9/15	Chic. & Alton	9/15
Chic. & Alton	9/30	L. S. & M. S.	9/30
L. S. & M. S.	10/12	Atch. Top. & S. Fe	10/12
Atch. Top. & S. Fe	10/15	Ill. Northern	10/15
Ill. Northern	10/19	Atch. Top. & S. Fe	10/19
Atch. Top. & S. Fe	10/23	L. S. & M. S.	10/23
L. S. & M. S.	10/31	Del. Lack. & Western	10/31
Del. Lack. & Western	11/28	Mich. Central	11/28
Mich. Central	12/26	L. S. & M. S.	12/26
L. S. & M. S.	1/1	Penn. R.R.	1/1

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *Jan. 16th*, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 63158 from C. H. EWINGS, Car Acc't.

FROM	TRAIN.	DATE.	TIME.	TO	L. OR E. DATE.	TIME.	CON.
N. Y. Central		6/12		L. S. & M. S.		6/12	
L. S. & M. S.		7/11		Ohio Cent. Lines		7/11	
Ohio Cent. Lines		7/18		L. S. & M. S.		7/18	
L. S. & M. S.		8/18		Pere Marquette		8/18	
Pere Marquette		9/8		L. S. & M. S.		9/8	
L. S. & M. S.		9/18		Wabash		9/18	
Wabash		9/28		L. S. & M. S.		9/28	
L. S. & M. S.		10/2		Chic. Mil. & St. P.		10/2	
Chic. Mil. & St. P.		10/5		Union Pacific		10/5	
Union Pacific		10/11		Southern Pacific		10/11	

113 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *Jan. 16th*, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 18236 from C. H. EWINGS, Car Acc't.

FROM	TRAIN.	DATE.	TIME.	TO	L. OR E. DATE.	TIME.	CON.
N. Y. Central		3/5		Mich. Central		3/5	
Mich. Central		3/6		Pere Marquette		3/6	
Pere Marquette		4/2		Mich. Central		4/2	
Mich. Central		4/10		Chic. Ind. & L'ville		4/10	
Chic. Ind. & Lou.		5/3		Elgin Jol. & Eastern		5/8	
Elgin, Jol. & Eastern		5/8		L. S. & M. S.		5/8	
L. S. & M. S.		5/13		Wheeling & L. Erie		5/13	
Wheeling & L. Erie		6/6		L. S. & M. S.		6/6	
L. S. & M. S.		6/9		Ill. Central		6/9	
Ill. Central		7/2		L. S. & M. S.		7/2	
L. S. & M. S.		8/21		Cin. Ham. & Dayton		8/21	
Cin. Ham. & Dayton		8/24		Louisvl. & N'shville		8/24	
Louisvl. & N'shville		9/24		Penn. Company		9/24	
Penn. Company		11/10		Lake Erie & Western		11/10	
Lake Erie & Western		11/25		Penn. Company		11/25	
Penn. Company		12/20		Clev. Cin. Chic. & St. L.		12/20	

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *Jan. 16th*, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 63123 from C. H. EWINGS, Car Acc't.

FROM	TRAIN.	DATE.	TIME.	TO	L. OR E. DATE.	TIME.	CON.
N. Y. Central		6/15		L. S. & M. S.			6/15
L. S. & M. S.		6/18		Penn. Railroad			6/18
Penn. Railroad		6/22		L. S. & M. S.			6/22
L. S. & M. S.		6/25		Baltimore & Ohio			6/25
Baltimore & Ohio		7/17		L. S. & M. S.			7/17
L. S. & M. S.		8/1		Penn. Company			8/1
Penn. Company		8/6		L. S. & M. S.			8/6
L. S. & M. S.		8/14		Wheeling & L. E.			8/14
Wheeling & Lake E.		9/5		Mich. Central			9/5
Mich. Central		9/19		Wis. Central			9/19
Wis. Central		9/21		Mich. Central			9/21
Mich. Central		9/26		Chic. Ter. & Trans.			9/26
Chic. Ter. & Trans.		10/7		Chicago Belt			10/7
Chic. Belt		10/8		N. Y. Chic. & St. L.			10/8
N. Y. Chic. & St. L.		10/10		L. S. & M. S.			10/10
L. S. & M. S.		11/5		Chic. Bur. & Quin.			11/5
Chic. Bur. & Quin.		11/20		Chic. Belt			11/20
Chic. Belt		11/29		Mich. Central			11/29
Mich. Central		12/8		Detroit, Tol. & Mil.			12/8
Detroit, Tol. & Mil.		12/21		Penn. Company			12/21

114 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *Jan. 16th*, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 63176 from C. H. EWINGS, Car Acc't.

FROM	TRAIN.	DATE.	TIME.	TO	L. OR E. DATE.	TIME.	CON.
N. Y. Central		2/11		L. S. & M. S.			2/11
L. S. & M. S.		2/14		C. C. C. & St. L.			2/14
C. C. C. & S. L.		2/17		Ohio Central Lines			2/17
Ohio Central Lines		2/22		Chesapeake & Ohio			2/22
Chesap. & Ohio		3/27		C. C. C. & St. L.			3/27
C. C. C. & St. L.		3/29		Ill. Central			3/29
Ill. Central		4/11		Chic. Ter. & Trans.			4/11
Chic. Ter. & Trans.		4/12		Chic. Belt			4/12
Chic. Belt		4/30		L. S. & M. S.			4/30
L. S. & M. S.		5/16		Chic. Junction			5/16
Chic. Junction		5/20		L. S. & M. S.			5/20
L. S. & M. S.		5/24		Lehigh Valley			5/24
Lehigh Valley		5/28		N. Y., N. H. & H.			5/28
N. Y., N. H. & H.		5/29		Boston & Maine			5/29
Boston & Maine		6/21		N. Y., N. H. & H.			6/21
N. Y., N. H. & H.		7/6		Lehigh Valley			7/6
Lehigh Valley		7/7		Ironton R.R.			7/7
Ironton R.R.		7/8		Lehigh Valley			7/8
Lehigh Valley		7/11		Mich. Central			7/11
Mich. Central		9/12		Lehigh Valley			9/12
Lehigh Valley		9/21		Norfolk & Western			9/21
Norfolk & Western		10/31		C. C. C. & St. L.			10/31
C. C. C. & St. L.		11/2		Grand Rap. & Ind.			11/2
Grand Rap. & Ind.		11/15		Dul. S. Shore & Atl.			11/15
Dul. S. Shore & Atl.		11/17		M. St. P. & S. Ste. M.			11/17
M. St. P. & S. Ste. M.		11/20		Dul. S. Shore & Atl.			11/20
Dul. S. Shore & Atl.		12/3		Grand Rap. & Ind.			12/3
Grand Rap. & Ind.		12/18		Penn. Company			12/18

115 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *Jan. 16th*, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 64431 from C. H. EWINGS, Car Acc't.

FROM	TRAIN.	DATE.	TIME.	TO	L. OR E. DATE.	TIME.	CON.
N. Y. Central		6/27		L. S. & M. S.	6/27		
L. S. & M. S.		7/8		Chic. Ind. & St. L.	7/8		
Chic. Ind. & S. L.		7/14		Mich. Central	7/14		
Mich. Central		7/30		Det. Tol. & Mil.	7/30		
Det. Tol. & Mil.		8/5		L. S. & M. S.	8/5		
L. S. & M. S.		8/18		Penn. R.R.	8/18		
Penn. R.R.		9/7		N. Y., N. H. & H.	9/7		
N. Y., N. H. & H.		9/9		Boston & Maine	9/9		
Bost. & Maine		9/17		N. Y., N. H. & H.	9/17		
N. Y., N. H. & H.		9/19		Bost. & Maine	9/19		
Bost. & Maine		9/24		N. Y., N. H. & H.	9/24		
N. Y., N. H. & H.		10/4		Penn. R.R.	10/4		
Penn. R.R.		10/22		Penn. Co.	10/22		

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *February* 9, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 61834 from C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from							
From N. Y. C.							
To L. S. & M. S.	July	2	1902		M		
From L. S. & M. S.							
To Elgin, Joliet & Eastern	"	6	"		M		
From Elgin, Joliet & Eastern							
To Chicago & No. Western	"	8	"		M		
From Chicago & No. Western							
To Union Pacific	"	10	"		M		
From Union Pacific							
To Southern Pacific	"	14	"		M		
From Southern Pacific							
To Union Pacific	Aug.	8	"		M		
From Union Pacific							
To Southern Pacific	"	11	"		M		
Delivered to Southern Pacific							
Rec'd from Southern Pacific							
From Southern Pacific							
To Atch., Topeka & Santa Fe Coast Line	Dec.	17	"		M		
From Atch., Topeka & Santa Fe Coast Line							
To Southern Pacific	"	18	"		M		

116 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *February* 9, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 14035 from C. H. EWINGS, Car Acc't.

MOVEMENTS.	MONTH.	DATE. DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from					M		
N. Y. C.					M		
To L. S. & M. S.	Dec.	20	1901		M		
From L. S. — M. S.					M		
To Cleve., Cin., Chic. & St. L.	"	23	"		M		
From Cleve., Cin., Chic. & St. L.					M		
To Norfolk & Western	"	28	"		M		
From Norfolk & Western					M		
To Cleve., Cin., Chic. & St. L.	Jan.	8	1902		M		
From Cleve., Cin., Chic. & St. L.					M		
To Norfolk & Western	"	12	"		M		
From Norfolk & Western					M		
To Chesapeake & Ohio	"	14	"		M		
From Chesapeake & Ohio					M		
To Southern	"	20	"		M		
Del'd to					M		
Rec'd from					M		
From Southern					M		
To Washington Southern	Feb.	20	"		M		
From Washington Southern					M		
To Southern	Mar.	15	"		M		
From Southern					M		
To Baltimore & Ohio	"	24	"		M		
From Baltimore & Ohio					M		
To Southern	Apr.	21	"		M		
From Southern					M		
To Baltimore & Ohio	July	9	"		M		
From Baltimore & Ohio					M		
To Southern	"	11	"		M		
From Southern					M		
To Washington Southern	Sept.	3	"		M		
Del'd to							
Rec'd from					M		
From Wash. Southern					M		
To Southern	Oct.	26	"		M		
From Southern					M		
To Chesapeake & Ohio	Nov.	7	"		M		
From Chesapeake & Ohio					M		
To Penn. R.R.	Dec.	3	"		M		
From Penn. R.R.					M		
To Chesapeake & Ohio	Jan.	4	1903		M		
From Chesapeake & Ohio					M		
To					M		
From					M		
To					M		
From					M		
To					M		
Del'd to					M		

117 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *February* 9, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 27941 from

C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from					M		
N. Y. C.					M		
To Mich. Central	June	12	1902		M		
From Mich. Central					M		
To Chic., R. I. & Pac.	"	14	"		M		
From Chic., R. I. & Pac.					M		
To Colo. Midland	"	18	"		M		
From Colo. Midland					M		
To Rio Grande Western	"	20	"		M		
From Rio Grande Western					M		
To Southern Pacific	"	21	"		M		
From Southern Pacific					M		
To Union Pacific	Aug.	8	"		M		
From Union Pacific					M		
To Southern Pacific	Sept.	16	"		M		
Del'd to							
Rec'd from					M		
From Southern Pacific					M		
To Union Pacific	"	22	"		M		
From Union Pacific					M		
To Rio Grande Western	"	23	"		M		
From Rio Grande Western					M		
To Colo. Midland	Oct.	7	"		M		
From Colo. Midland					M		
To Denver & Rio Grande	"	31	"		M		
From Denver & Rio Grande					M		
To Colo. Midland	Nov.	5	"		M		
From Colo. Midland					M		
To Chic., R. I. & Pac.	"	25	"		M		
From Chic., R. I. & Pac.					M		
To					M		
Del'd to					M		

118 EXHIBIT "C" FOR IDENTIFICATION.

PUBLIC STATUTES OF MASSACHUSETTS, 1882.

(p. 23.) See note, 125 U. S., 531.

EXTRACT FROM THE CONSTITUTION OF MASSACHUSETTS.

Part 2, Chap. 1, Sect. 1, Art. 4, of the Constitution gives the Legislature power "to impose and levy proportional and reasonable assessments, rates and taxes upon all the inhabitants of, and persons resident, and estates lying within the said Commonwealth," and also "to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise and commodities whatsoever, brought into, produced, manufactured, or being within the same."

(p. 128.) CHAPTER 13.

OF THE TAXATION OF CORPORATIONS.

* * * * * * *

(p. 138.) TAXATION OF CORPORATE FRANCHISES.

SECT. 38. Every corporation chartered by the commonwealth, or organized under the general laws for purposes of business or profit, having a capital stock divided into shares, excepting banks whose shares are otherwise taxable under this chapter, and except those specified in sections forty-three and forty-six, shall annually, between the first and the tenth days of May, return to the tax commissioner, under the oath of its treasurer, a complete list of its shareholders, with their places of residence, the number of shares belonging to each on the first day of May, the amount of the capital stock of the corporation, its place of business, the par value and market value of the shares on the said first day of May. Such return shall, in the case of stock held as collateral security, state not only the
119 name of the person holding the same, but also the name of the pledger and his residence. The returns shall also contain a statement in detail of the works, structures, real estate and machinery owned by said corporation and subject to local taxation within the commonwealth, and of the location and value thereof. Railroad and telegraph companies shall return the whole length of their lines, and the length of so much of their lines as is without the commonwealth; other corporations required to make a return under this section shall also return the amount, value and location of all works, structures, real estate and machinery owned by them and subject to local taxation without the commonwealth; *provided*, that nothing herein contained shall exempt any corporation from making all returns required by its charter.

(p. 139.) SEC. 39. The tax commissioner shall ascertain, from the returns or otherwise, the true market value of the shares of each corporation included in the provisions of the preceding section, and shall estimate therefrom the fair cash valuation of all of said shares constituting its capital stock on the first day of May next preceding, which shall be taken as the true value of its corporate franchise for the purposes of this chapter. He shall also ascertain and determine the value and amount of all real estate and machinery owned by each corporation, and subject to local taxation, and of the deductions provided in the following section; and for this purpose he may take the amount or value at which such real estate and machinery are assessed at the place where the same are located as the true amount or value; but such local assessment shall not be conclusive of the true amount or value thereof.

120 (p. 139.) SECT. 40. Every corporation embraced in the provisions of section thirty-eight shall annually pay a

tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock, as determined in the preceding section, after making the deductions provided for in this section, at a rate determined by an apportionment of the whole amount of money to be raised by taxation upon property in the commonwealth during the same current year, as returned by the assessors of the several cities and towns under section eighty-six of chapter eleven, upon the aggregate valuation of all the cities and towns for the preceding year, as returned under sections fifty-four and fifty-five of said chapter; *provided*, that in case the return from any city or town is not received prior to the twentieth day of August, the amount raised by taxation in said city or town the preceding year, as certified to the secretary of the commonwealth, may be adopted for the purpose of this determination; and *provided, further*, that the amount of tax assessed upon polls the preceding year, as certified to the secretary, may be taken as the amount of poll tax to be deducted from the whole amount to be raised by taxation, for the purpose of ascertaining the amount to be raised by taxation upon property. From the valuation, ascertained and determined as aforesaid, there shall be deducted—*First*, in case of railroad and telegraph companies, whose lines extend beyond the limits of the commonwealth, such portion of the whole valuation of their capital stock, ascertained as aforesaid, as is proportional to the length of that part of their line lying without the commonwealth; and also an amount equal to the value, as determined by the tax commissioner, of their real
121 estate and machinery located and subject to local taxation within the commonwealth; *Second*, in case of other corporations, included in section thirty-eight of this chapter an amount equal to the value, as determined by the tax commissioner, of their real estate and machinery, subject to local taxation, wherever situated; *provided*, that, whenever the charter of a corporation provides a different method of ascertaining the valuation of its corporate franchise for the purposes of this chapter, the same shall be ascertained in the method provided in such charter.

* * * * * * *

(p. 140.) SECT. 42. Every corporation or association chartered or organized elsewhere, which owns, or controls and uses, under lease or otherwise, a line of telegraph within this commonwealth, shall make all the returns prescribed in section thirty-eight to be made by telegraph companies within the commonwealth, excepting the list of its shareholders; and shall annually pay a tax at the same rate, and to be ascertained and determined in the same manner as is provided in section forty; and all telegraph lines within the commonwealth controlled and used by such corporation or association, shall, for the purposes of this chapter, be taken and considered as part of its own lines.

* * * * * * *

(p. 142.) SECT. 53. The tax commissioner shall, as soon as may be after the first Monday in August, in each year, notify the treasurer of each corporation, company, copartnership, or association liable thereto, of the amount of its tax under sections twenty-five,

forty, forty-two, forty-five, forty-seven, fifty, and fifty-two, to become due and payable to the treasurer of the commonwealth within thirty days from the date of such notice: *provided*, that it shall not
122 be due and payable earlier than the first day of November. Such notice shall also state that within ten days after the date thereof the said corporation, company, copartnership, or association may apply for a correction of said tax, and be heard thereon before the board of appeal hereinafter established.

(p. 142.) SECT. 54. Any corporation, company, copartnership, or association taxable under the provisions of sections forty, forty-two, forty-three, forty-five, forty-seven, fifty, and fifty-two, neglecting to make the returns required by this chapter, or refusing or neglecting, when required thereto, to submit to the examinations provided for therein, shall forfeit two per cent upon the par value of its capital stock, all which penalties may be recovered by an action of tort, brought in the name of the commonwealth, either in the County of Suffolk or in the county where the corporation is located. If any corporation, company, copartnership, or association fails to pay the taxes required to be paid to the treasurer of the commonwealth under the provisions of said sections forty, forty-two, forty-three, forty-five, forty-seven, fifty, fifty-one, and fifty-two, he may forthwith commence an action of contract in his own name, as treasurer, for the recovery of the same, with interest at the rate of twelve per cent. per annum until the same are paid. All penalties under this section, and under sections seven, forty-seven, fifty, and fifty-two, may also be enforced, and all taxes under said sections forty, forty-two, forty-three forty-five, forty-seven, fifty, fifty-one, and fifty-two, may also be collected by information brought in the Supreme Judicial Court at the relation of the treasurer of the commonwealth, and upon such information the Court may issue
123 an injunction restraining the further prosecution of the business of the corporation, company, copartnership, or association, until all such taxes due or penalties incurred shall be paid, with interest at the rate aforesaid, and costs. In any proceeding under this section the certificate of the tax commissioner or his deputy shall be competent evidence of all determinations made and notices given by him, and of all values, amounts, and other facts required to be fixed or ascertained by him under this chapter.

* * * * * * *

(p. 143.) SECT. 56. The lessee of the works, structures, real estate, or machinery of any corporation, company, copartnership, or association taxed under sections forty, forty-two, forty-three, forty-five, forty-seven, fifty, fifty-one, ane fifty-two, shall be liable as well as the lessor to pay the amount of said tax, and upon such payment may, in the absence of any agreement to the contrary, retain the same out of the rent of the property, or recover the same in an action against the lessor.

* * * * * * *

(p. 144.) SECT. 60. The tax on corporate franchises herein imposed upon any corporation shall not affect nor prevent the imposition and collection of any other tax now authorized, or that

may hereafter be authorized, upon any especial privilege, franchise or business enjoyed or exercised by such corporation.

SECT. 61. Any party aggrieved by the decision of the tax commissioner arising under the provisions of sections twenty-five to fifty-eight inclusive, excepting corporations named in section
124 forty-six, may apply to the board of appeal constituted under the provisions of the following section for a correction of the same.

SECT. 62. The treasurer and the auditor of the commonwealth, together with one of the council to be named by the governor, shall constitute a board of appeal, to which board any party aggrieved by a decision of the tax commissioner upon any matter arising under this chapter, from his decision upon which an appeal is given, may apply within ten days after notice of such decision for a correction of the same. Upon such appeal said board shall, as soon as may be, give a hearing to such party, and shall thereupon decide the matter in question, and notify the tax commissioner and the party appealing; and such decision shall be final and conclusive as to the rights of the parties affected, although payments may have been made as required by the decision of the tax commissioner appealed from. Any over-payment of tax, determined by the decision of said board of appeal, shall be reimbursed from the treasury of the commonwealth."

ACTS AND RESOLVES PASSED BY THE GENERAL COURT OF MASSACHUSETTS IN THE YEAR 1900.

CHAPTER 468.

"An Act to Authorize the Lease of the Boston and Albany Railroad to The New York Central and Hudson River Railroad Company.

SECTION 1. Subject to the conditions hereinafter mentioned the consent of the Commonwealth is hereby given to the contract and lease of the railroad, franchises and property of the Boston and Albany Railroad Company, and to a supplemental contract in connection therewith for the sale of certain of its assets, which contracts
125 were made and entered into between the directors of the Boston and Albany Railroad Company and the directors of the New York Central and Hudson River Railroad Company on the 15th day of November in the year eighteen hundred and ninety-nine, and which were severally approved and adopted by the votes of the stockholders owning more than two-thirds of the stock of each of said corporations which was represented and voted upon in person or by proxy at special meetings called separately for that purpose.

* * * * * * *

(p. 466.) SECTION 5. The lessee, so long as it has possession of the said railroad under said lease, shall, so far as the operation of said railroad is concerned, be subject to the provisions of all laws now in force or which hereafter may be enacted concerning railroad corporations incorporated within this Commonwealth.

* * * * * * *

(p. 467.) SECTION 11. Upon any failure to comply with and observe the final decrees and mandates of the supreme judi-

cial court of this Commonwealth, provided for in the foregoing sections of this act, or of any federal court of competeent jurisdiction, the consent and authority herein given may be revoked and annulled at any time by the general court, notwithstanding any prior failure to observe and comply with any decree or mandate aforesaid. The remedies provided in this and the preceding sections shall be in addition to and shall not repeal any remedies already existing.

SECTION 12. This act shall take effect upon its passage."

Approved July 17, 1900.

126 "EXHIBIT C-1 FOR IDENTIFICATION."

99 MASSACHUSETTS REPORTS, PAGES 148-154.

THE ATTORNEY GENERAL

vs.

BAY STATE MINING COMPANY.

The tax of a certain percentage of the par of its capital stock, imposed by the St. of 1865, c. 283, Sec. 8, on every company or association "having an office or place of business within this Commonwealth for the direction of its affairs or transfer of shares," and "incorporated elsewhere" "for the purpose of engaging without the limits of the Commonwealth in the business of coal mining or other mining, quarrying, or extracting carbonaceous oils from the earth, or for the purpose of purchasing, selling or holding mines or lands without the Commonwealth," is warranted by the Constitution of the Commonwealth, and is not in conflict with the Constitution of the United States; nor was said sec. 8 in any respect repealed or annulled by the St. of 1866, c. 291.

Information filed December 13, 1867, on the St. of 1865, c. 283, sec. 14, at the relation of the treasurer and receiver-general of the Commonwealth, seeking a decree for payment by the defendants, a corporation organized under the law of Michigan for the purpose of engaging in the business of mining copper in that State, of taxes in 1866 and 1867, under the St. of 1865, c. 283, sec. 8, the material part of which is printed in the margin;* and for an injunc-

*"Every corporation chartered by this Commonwealth, or organized under the general laws, for the purpose of engaging, without the limits of the Commonwealth, in the business of coal mining or other mining, quarrying or extracting carbonaceous oils from the earth, or for the purpose of purchasing, selling or holding mines or lands without the Commonwealth, and every such company or association, incorporated elsewhere, and having an office or place of business within the Commonwealth for the direction of its affairs or transfers of shares, shall, semi-annually, between the first and the tenth day of June and December, make a return, under the oath of its treasurer, or president, to the tax commissioner, of the whole amount of its capital stock, as fixed by the corporation, on the first day respectively of May and November next preceding, and pay to the treasurer of the Commonwealth a tax of one twentieth of one per cent. upon said capital stock at the par thereof."

127 tion against further prosecution of business in the Commonwealth by the defendants, until the same should be paid with interest.

The information alleged the maintenance by the defendant corporation of an office or place of business, namely, the office of its treasurer, in Boston, for the direction of its affairs and transfer of shares; and the making of returns by its treasurer to the tax commissioner in June and December, 1866, and June, 1867, in conformity with the statute; that in truth and fact the par value of its capital stock as fixed on May 1 and November 1, 1866, and May 1, 1867, was thus returned; and that "by reason thereof said corporation became liable and was bound to pay to the treasurer of the Commonwealth" the taxes alleged, being on-twentieth of such par value at the three dates last named.

The answer substantially admitted the facts alleged in the information; but denied "that said corporation owes the taxes mentioned in said information to said Commonwealth and interest thereon, or any part of said taxes and interest, or is or was liable and bound to pay to the treasurer of said Commonwealth said taxes;" alleged that the defendant corporation "is a foreign corporation owning real estate in the state of Michigan, and employing its capital stock in the working of a mine in said state, that said capital stock is owned in part by citizens of states other than the
128 state of Massachusetts, that nearly all the contracts for labor at said company's mine and for materials purchased for use at said mine are entered into in Michigan, and drafts for the payment of the same, drawn by the agent of the company at the mine on the treasurer of the company, residing in Boston, are delivered to and received by the laborers, and parties furnishing materials, as payment;" further denied "that said Commonwealth has the right or power, under the Constitution of the United States, or under the Constitution of the said Commonwealth, to tax said corporation, said corporation being a foreign corporation and receiving all its corporate powers and privileges from the state of Michigan," and finally alleged "that the provisions of said St. of 1865, c. 283, so far as it is pretended that the same are applicable to said defendants in requiring the payment of a tax to the treasurer of said Commonwealth are repealed by the provisions of the St. of 1866, c. 291.

The case was reversed by Foster, *J.*, on the information and answer for the determination by the full court.

C. Allen, Attorney General, and J. C. Davis, for the Commonwealth, besides cases cited for the defendants and in the opinion, cited Tremont Bank *v.* Boston, 1 Cush. 145, Angell & Ames on Corporations, sec. 486a; DeGroot *v.* Van Duzer, 20 Wend. 390; Bank of Augusta *v.* Earle, 13 Pet. 589; Corfield *v.* Coryell, 4 Wash. C. C. 380; Blackstone Manufacturing Co. *v.* Blackstone, 13 Gray, 488; McCulloch *v.* Maryland, 4 Wheat. 429; Providence Bank *v.* Billings, 4 Pet. 564; Nathan *v.* Louisiana, 8 How. 82; Biddle *v.* Commonwealth, 13 S. & R. 409; Commonwealth *v.* Milton, 12 B. Monr. 212; Fire Department *v.* Noble, 3 E. D. Smith, 440;
129 Fire Department *v.* Wright, *Ib.* 453; State *v.* Delaware, Lackawanna & Western Railroad Co., 1 Vroom, 473.

J. G. Jackson, for the defendants. 1. The Commonwealth has no authority to tax the capital stock of a foreign corporation. The legislature has power to impose "proportional and reasonable assessments, rates and taxes, upon all the inhabitants of, and persons resident and estates lying within the Commonwealth;" and also to impose "reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities whatsoever, brought into, produced, manufactured or being within the same." Const. of Mass., part 2, c. 1, sec. 1, art. 4. But this gives no authority to impose taxes on property or persons not subject to their jurisdiction. The capital stock, as such, of the defendant corporation, is beyond its jurisdiction.

In Portland Bank *v.* Apthorp, 12 Mass. 252, and Commonwealth *v.* Hamilton Manufacturing Co., 12 Allen, 298, the defendants being domestic corporations, it was held that under the term "commodity" their charters were included, and that the legislature, which created and sold these commodities, might, as the price of the commodity, in the one case levy an excise or duty each year on the franchise of the bank, measured by the capital stock which it permitted the bank to hold, and in the other case measure the value of the commodity sold by the market value of the shares. But in the case at bar, though the legislature may compel the defendant corporation to pay a license for maintaining an office for the transaction of part of its business in Massachusetts, yet, having no control over the charter, it cannot levy a tax on the capital stock, all of which
130 is employed in another state. Massachusetts does not grant the defendant's franchise; and so cannot tax it. The principle that a state, in order to tax a corporation on its franchise, must have granted the charter, or have the corporate property within its limits, seems to be expressly recognized by the St. of 1864, c. 208, secs. 6, 9, and by the very St. of 1865, c. 283, secs. 5, 7, relating to railroad and telegraph companies extending beyond the limits of Massachusetts or incorporated by other states. See also Eastern Bridge *v.* The County, 9 Barr, 415.

The real and personal estate of the corporation may be taxed to the corporation by any power within whose jurisdiction it may be found; and the interest of the shareholders is personal to them, and may be taxed to them in their places of domicil, whether the shares so held by them are shares of foreign or domestic corporations, and notwithstanding, in the case of foreign corporations, that such corporations have paid taxes on their franchises and corporate property to the power which created them. Gordon *v.* Appeal Tax Court, 3 How. 133; Angell & Ames on Corporations, sec. 458; Dwight *v.* Mayor & Aldermen of Boston, 12 Allen 316; Commonwealth *v.* Berkshire Insurance Co. 98 Mass. 25. But if Massachusetts has jurisdiction for taxation over such of the shares of this Michigan corporation as are held by citizens of Massachusetts, it does not follow that it has therefore such jurisdiction over all the shares of the capital stock of the corporation, part of which are owned by citizens of other states, and that it may so tax property in other states belonging to citizens of other states.

2. The St. of 1865, c. 283, on which this information is based, so far as applicable to the taxation of the capital stock of foreign mining corporations to such corporations, and not to the individual holders of shares in such stock, is repealed by the statute of 1866, c. 291, sec. 2, and the power to tax the shares in such corporations remitted to the towns and cities where the stockholders reside.

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3. By the answer it appears that nearly all the contracts for labor at the mine in Michigan, and for materials purchased, are entered into in Michigan, and drafts for payments in fulfillment of these contracts are drawn on the treasurer of the company. The information asks the court to enforce the statute by enjoining the treasurer from paying these drafts; which would be in contravention of the Const. of the U. S., art. 1, sec. 10, forbidding any state from passing any law impairing the obligation of contracts.

WELLS, *J.*:

The defence in this suit seems to rest upon the supposition that the existence and organization of the corporation, the functions and capacities with which it is endowed by the law creating it, are alone what constitute the franchise or "commodity," which is the subject of the tax or excise imposed by the St. of 1865, c. 283. If it were so, there would be much force in the argument that, when these are derived exclusively from the authority of another state, they are not proper subjects of state taxation here.

But we think this is a too limited view of the matter. It is not merely the creation of corporate functions and privileges, or the conferring of rights and franchises by the legislature, which entitles the state to tax the possessor of such privileges and rights. The exercise of powers or privileges, and even of occupations without special powers or privileges, may be equally subjected to such taxation, under the constitutional authority to "impose and levy reasonable duties and excises." It was so considered in the case of Portland Bank *v.* Apthorp, 12 Mass. 252; and the tax of one per cent. laid upon the capital stock of the bank, was justified upon principles equally applicable to individauls transacting similar business, and to brokers, factors, auctioneers, &c. The tax was not sustained on the ground that the corporation derived its existence from the state which imposed the tax; on the contrary, one principal question in that case was, whether, by the charter, the state had not conferred upon the bank the privilege of doing the business for which it was created, without restriction, so as to exempt the corporation from the requisition of any tax or duty afterwards levied upon the exercise of that privilege.

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That decision is sufficient for the present case. The tax is, indeed, in form, levied upon the capital stock of the corporation. But it is not merely the franchise of incorporation that is the basis of the tax, nor is it the capital, regarded merely as property. In case of domestic corporations, it is based upon a valuation which involves an estimate of all the advantages, present and prospective, which the stock is supposed to derive from the combination of capital and the

exercise of all the rights and privileges enjoyed by the corporation in the conduct of its business. Commonwealth *v.* Hamilton Manufacturing Co. 12 Allen, 298.

When the exercise of corporate functions, authorized by the state, is extended beyond the limits of the state, as in railroads and telegraph lines, the tax is apportioned accordingly. In the case of mining companies whose mines are without the state, the tax is limited by the "par" of the stock, and the tax upon foreign companies is founded upon the express consideration of "having an office or place of business within the Commonwealth for the direction of its affairs or transfer of shares." A mining corporation
133 which comes within the terms of this provision has its domicil of business within the Commonwealth, as completely as one that is organized under our General Statutes for the prosecution of a like enterprise. A corporation which seeks, by its agents, to establish a domicil of business in a state other than that of its creation, must take that domicil, as individuals are always understood to do, subject to the responsibilities and burdens imposed by the laws which it finds in force there. The state may deny to foreign corporations the right to transact their business, hold property, or exercise any corporate function whatever within its limits. Or it may permit them to exercise such privileges upon terms prescribed by law, as has long been done in relation to insurance companies. Erie Railway Co. *v.* New Jersey, 2 Vroom 531. The provisions of the statute in question are founded upon this right of exclusion or of conditional admission. Exclusion is the remedy provided to enforce compliance. The very defence to the suit implies the enjoyment of valuable rights and privileges within the Commonwealth, which a foreign corporation can only exercise by comity and the permission of the state.

The court are all of opinion that the tax upon the defendant corporation is legal; that it is warranted by the Constitution of the Commonwealth, and is not in conflict with any provision of the Constitution of the United States, and that sec. 8 of the St. of 1865, c. 283, is in no respect repealed or annulled by the St. of 1866, c. 291.

The Commonwealth is therefore entitled to an injunction restraining the further prosecution of the business of the defendant corporation within the Commonwealth, excepting the payment of debts already contracted, until all taxes due under said act shall be paid with interest and costs.

134 "EXHIBIT C–1 FOR IDENTIFICATION" (Con't).

33 FEDERAL REPORTER, PAGE 129.

ATTORNEY-GENERAL
v.
WESTERN UNION TELEGRAPH COMPANY.

(Circuit Court, D. Mass., November 28, 1887.)

1. Telegraph Companies—Taxation—Power of State.

Pub. St. Mass., c. 13, sec. 40 provides that every railroad and telegraph company shall pay annually a tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock, after deducting from such valuation such portion as is apportionate to the length of the line lying without the state; and also an amount equal to the value of the real estate and machinery located and subject to local taxation within the state. Held, that the right to tax telegraph companies under this statute is not impaired by Rev. St. W. S. secs. 5263–5266, conferring certain privileges on telegraph companies.

2. Constitutional Law—Interstate Commerce—Taxation of Telegraph Companies.

A tax levied under Pub. St. of Mass., c. 13, sec. 40, providing for the taxation of railroad and telegraph companies is not void as repugnant to the Const. U. S., Art. 1, sec. 8, which gives congress power to regulate commerce between the several states.

(Sub-note 1. Respecting interstate commerce in general see Pearson *v.* Distillery Co. (Iowa), 34 N. W. Rep. 1 and note.)

In Equity.

Harvey N. Shepard, Ass't Att'y General, for complainant.
Geo. S. Hale, for defendant.

COLT, *Justice:*

135 This is an information filed by the attorney general of Massachusetts under section 54, chapter 13, of the Public Statutes of Massachusetts, to collect a tax claimed to be due, and for an injunction restraining the defendant from the further prosecution of its business until such tax is paid.

The defendant is a telegraph company, organized under the laws of the State of New York, for the purpose of business and profit, and having a capital stock divided into shares. On or about June 12, 1867, the company filed its written acceptance with the postmaster general of the United States of the restrictions and obligations required by the act of congress of July 24, 1866, relating to telegraphs.

Rev. St. secs. 5263–5269. By section 6263 it is provided that any telegraph company organized under the laws of any state shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States; over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under or across the navigable streams or waters of the United States. The information was originally filed in the state court April 27, 1886, and removed to this court by the defendant. On May 1, 1885, the defendant owned or controlled, under lease or otherwise, 146,052.60 miles of telegraph line, of which 2,833.05 were situate within the state of Massachusetts. In September, 1885, the tax commissioners, in the manner required by the laws of the state, estimated the fair cash valuation of the stock of the corporation on May 1, 1885, at $47,500,000, and allowed as credits for shares held by the company unissued and stocks in other companies outside of its system $8,773,622.70, leaving $38,713,924. The commissioner considered the valuation of the corporate franchise of
136 the defendant subject to taxation in the state to be $750,952, and he assessed a tax thereon of $10,618.46. More than 2,334.55 miles of the line within the state are over, under or across post roads, but the commissioner ignored this fact. The defendant has continually transmitted messages over its lines on said post roads between the several departments of the United States Government at rates fixed by the post-master general as required by the act of July 24, 1866. (Rev. St. sec. 5266.) It is impossible for the company to determine what portion of any sums received were for services performed in the state in the transmission through the state or any portion thereof of messages received or delivered out of it, or what portion of any sums received were for services not on lines of said post roads; but approximately 70% of the receipts were for messages received and delivered out of the state. The defendant on May 1, 1885, owned a large amount of real estate subject to local taxation out of the state of Massachusetts on which there was assesed and paid more than $48,000 of taxes. In the assessment of the tax herein complained of no allowance or deduction was made for this, and in ascertaining the valuation of the defendant's franchise for the purposes of taxation no account was taken of said real estate or buildings or the taxes paid thereon. The position taken by the defendant is that this tax levied under Chap. 13 of the Pub. Statutes of Massachusetts is illegal—*first:* Because of its operation and effect upon a franchise granted by the United States and used for its purposes and benefit; *second:* because it is a tax upon interstate or foreign commerce; *third:* because it *it* is in effect levied upon real estate located and taxed in another state. There is nothing in the act of July 24,
1866, conferring certain privileges on telegraph companies
137 who shall choose to take the benefit of its provisions, which impairs the right of a state to tax the property or franchise of the corporation in the manner exercised by the state of Massachusetts in the present case; nor is such a tax void as repugnant to sec. 8 of art. 1 of the Constitution, which gives congress power to

regulate commerce with foreign nations and among the several states.

In Telegraph Co. *vs.* Texas, 105 U. S. 460, the Supreme Court held a state statute imposing a specific tax on each message which it transmitted beyond the state, or which a public officer sends over its lines on business of the United States was void so far as it was a tax on interstate business, or a tax by a state on the means employed by the United States to execute its constitutional powers. It will be observed that this was a direct tax on each message sent out of the state as well as a direct tax on messages sent by the government. In the present case, however, the tax is imposed upon the shares of capital stock which represent the property and franchise of the corporation. Every tax on the property or franchise of a telegraph company may operate to increase the cost of messages sent, but that does not make such a tax invalid. In the case just referred to Chief Justice Waite, speaking for the court, says: "The Western Union Telegraph Company having accepted the restrictions and obligations of this provision by congress, occupies in Texas the position of an instrument of foreign and interstate commerce and of a government agent for the transmission of messages on public business. Its property in the state is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper manner on account of its occupation and its business." The precise question now presented is
138 "whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out of the state, or sent by public officers on the business of the United States."

It was this last question that was determined in the negative. In the Delaware Railroad Tax Case, 18 Wall. 206, an act of the legislature of Delaware imposing a tax quite similar to the one now complained of was held not to conflict with the power of congress to regulate commerce. The court in that case observes: "The state may impose taxes on the corporation as an entity existing under its laws as well as upon the capital stock of a corporation or its separate corporate property. And the manner in which its valuation shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the state; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction."

The question of what constitutes a tax upon foreign or interstate commerce had frequently come before the Supreme Court for adjudication and I find no case which sustains the view taken by the defendant in this case. The question is carefully reviewed in the recent cases of Fargo *v.* Michigan, 121 U. S. 230; 7 Sup. Ct. Rep. 857, and Steamship Co. *vs.* Pennsylvania, 122 U. S. 326; 7 Sup. Ct. Rep. 1118.

Sec. 40, Chap. 13, Pub. Stat. of Massachusettts provides that every corporation embraced in the provision of sec. 38 shall pay a tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock at a certain rate deter-
139 mined as therein set forth, deducting in the case of railroads and telegraph companies whose lines extend beyond the limits

of the commonwealth such portion of the whole valuation of their capital stock as is proportional to the length of that part of their line lying within the commonwealth; and also an amount equal to the value, as determined by the tax commissioner, of their real estate and machinery located and subject to local taxation within the commonwealth; in case of other corporations an amount shall be deducted equal to the value of their real estate and machinery subject to local taxation wherever situate. The deductions in the case of corporations generally of all real estate and machinery wherever situate and in the case of railroad and telegraph companies whose lines extend beyond the limits of the commonwealth of only the real estate and machinery lying within the state, is a question of legislative discretion, and no valid ground has been suggested upon which this court for this reason has a right to declare a tax so levied invalid in whole or in part. I think a decree should be entered for the complainant and that an injunction as prayed for should be granted unless the amount taxed is paid by the defendant within 30 days from the entry of a decree in the cause. Decree for complainant.

United States Reports, October Term, 1887, No. 125, pages 530-555.

WESTERN UNION TELEGRAPH COMPANY
v.
THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

No. 1325. Argued February 15, 1888. Decided March 19, 1888.

140 The privilege conferred upon telegraph companies by Rev. Stat. sec. 5263 carries with it no exemption from the ordinary burdens of taxation in a State within which they may own or operate lines of telegraph.

The laws of Massachusetts impose a tax upon the Western Union Telegraph Company on account of the property owned and used by it within that State, the value of which is to be ascertained by comparing the length of its lines in that State with the length of its entire lines; and such a tax is essentially an excise tax, and is not forbidden by the fact of the acceptance on the part of the company of the rights conferred on telegraph companies by Rev. Stat. sec. 5263, nor by the commerce clause of the Constitution.

The principles established by the statutes of Massachusetts for regulating the taxation of corporations doing business within its limits, whether domestic or foreign, do not appear to be unfair or unjust.

A state statute which authorizes an injunction to be issued to restrain a corporation organized under the laws of another State, whose taxes are in arrear, from prosecuting its business within the State until the taxes are paid, is void so far as it assumes to confer power upon a court to so restrain a telegraph company which has ac-

cepted the provisions of Rev. Stat. sec. 5263 from operating its lines over military and post roads of the United States.

In Equity. The bill was filed by the Attorney General of the Commonwealth of Massachusetts, at the relation of the Treasurer of that State, and on behalf of the Commonwealth, in the Supreme Judicial Court of that State on the 27th of April, 1886. It averred that certain proceedings had been taken in accordance with law and under the Statutes of that State, to assess taxes in that State
141 in the year 1885 upon the capital stock of the Western Union Telegraph Company, a corporation owning, controlling, and using, under lease, or otherwise, lines of telegraph within that Commonwealth for purposes of business or profit. The provisions in the Constitution and laws of Massachusetts which were relied upon are printed in the margin.*

(*) 1. *Extract from the Constitution of Massachusetts.*

Part 2, Ch. 1, Sect. 1, Art. 4, of the Constitution gives the Legislature power "to impose and levy proportional and reasonable assessments, rates and taxes, upon all the inhabitants of, and persons resident, and estates lying within the said Commonwealth," and also "to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise and commodities whatsoever, brought into, produced, manufactured or being within the same."

2 *Extracts from the Public Statutes of Massachusetts.*

"Chapter 13, Sect. 38. Every corporation chartered by the Commonwealth, or organized under the general laws, for the purposes of business or profit, having a capital stock divided into shares, excepting banks whose shares are otherwise taxable under this chapter, and except those specified in sections forty-three and forty-six, shall annually, between the first and the tenth day of May, return to the tax commissioner, under the oath of its treasurer, a complete list of its shareholders, with their places of residence, the number of shares belonging to each on the first day of May, the amount of the capital stock of the corporation, its place of business, the par value and market value of the shares on said first day of May. Such return shall, in the case of stock held as collateral security, state not only the name of the person holding the same, but also the name of the pledger and his residence. The returns shall also contain a statement in detail of the works, structures, real estate and machinery owned by said corporation and subject to local taxation within the commonwealth and of the location and value thereof. Railroad and telegraph companies shall return the whole length of their lines, and the length of so much of their lines as is without the commonwealth; other corporations required to make a return under this section shall also return the amount, value and location of all works, structures, real estate, and machinery owned by them and subject to local taxation without the commonwealth: *provided*, that nothing herein contained shall exempt any corporation from making all returns required by its charter.

"Sect. 39. The tax commissioner shall ascertain, from the returns

or otherwise, the true market value of the shares of each
142 corporation included in the provisions of the preceding section, and shall estimate therefrom the fair cash valuation of all of said shares constituting its capital stock on the first day of May next preceding, which shall be taken as the true value of its corporate franchise for the purposes of this chapter. He shall also ascertain and determine the value and amount of all real estate and machinery owned by each corporation, and subject to local taxation, and of the deductions provided in the following section; and for this purpose he may take the amount or value at which such real estate and machinery are assessed at the place where the same are located as the true amount or value; but such local assessment shall not be conclusive of the true amount or value thereof.

"SECT. 40. Every corporation embraced in the provisions of section thirty-eight shall annually pay a tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock, as determined in the preceding section, after making the deductions provided for in this section, at a rate determined by an apportionment of the whole amount of money to be raised by taxation upon the property in the commonwealth during the same current year, as returned by the assessors of the several cities and towns under section eight- six of chapter eleven, upon the aggregate valuation of all the cities and towns for the preceding year, as returned under sections fifty-four and fifty-five of said chapter: *provided*, that in case the return from any city or town is not received prior to the twentieth day of August, the amount raised by taxation in said city or town the preceding year, as certified to the secretary of the commonwealth, may be adopted for the purpose of this determination; and *provided, further*, that the amount of tax assessed upon polls the preceding year, as certified to the secretary, may be taken as the amount of poll tax to be deducted from the whole amount to be raised by taxation, for the purpose of ascertaining the amount to be raised by taxation upon property. From the valuation, ascertained and determined as aforesaid, there shall be deducted,—*First*, in case of railroad and telegraph companies, whose lines extend beyond the limits of the commonwealth, such portion of the whole valuation of their capital stock, ascertained as aforesaid, as is proportional to the length of that part of their line lying without the commonwealth, and also an amount equal to the value as determined by the tax commissioner, of their real estate and machinery located and subject to local taxation within the commonwealth: *second*, in case of other corporations, included in section thirty-eight of this chapter, an amount equal to the value, as determined by the tax commissioner, of their real estate and machinery, subject to local taxation, wherever situated: *Provided*, that, whenever the charter of a corporation pro-
vides a different method of ascertaining the valuation of its
143 corporate franchise for the purposes of this chapter, the same shall be ascertained in the method provided in such charter."

"SECT. 42. Every corporation or association chartered or organized elsewhere, which owns, or controls and uses, under lease or otherwise, a line of telegraph within this commonwealth, shall make

all the returns prescribed in section thirty-eight to be made by telegraph companies within the commonwealth excepting the list of its shareholders; and shall annually pay a tax at the same rate, and to be ascertained and determined in the same manner as is provided in section forty; and all telegraph lines within the commonwealth controlled and used by such corporation or association, shall for the purposes of this chapter, be taken and considered as part of its own lines."

"SECT. 53. The tax commissioner shall, as soon as may be after the first Monday in August in each year, notify the treasurer of each corporation, company, copartnership, or association liable thereto, of the amount of its tax under sections twenty-five, forty, forty-two, forty-five, forty-seven, fifty, and fifty-two, to become due and payable to the treasurer of the commonwealth within thirty days from the date of such notice: *provided*, that it shall not be due and payable earlier than the first day of November. Such notice shall also state that within ten days after the date thereof the said corporation, company, copartnership, or association may apply for a correction of said tax, and be heard thereon before the board of appeal hereinafter established.

"SECT. 54. Any corporation, company, copartnership, or association taxable under the provisions of sections forty, forty-two, forty-three, forty-five, forty-seven, fifty, and fifty-two, neglecting to make the returns required by this chapter, or refusing or neglecting, when required thereto, to submit to the examinations provided for therein, shall forfeit two per cent. upon the par value of its capital stock; all which penalties may be recovered by an action of tort, brought in the name of the commonwealth, either in the county of Suffolk or in the county where the corporation is located. If any corporation, company, copartnership, or association fails to pay the taxes required to be paid to the treasurer of the commonwealth under the provisions of said sections forty, forty-two, forty-three, forty-five, forty-seven, fifty, fifty-one, and fifty-two, he may forthwith commence an action of contract in his own name, as treasurer, for the recovery of the same, with interest at the rate of twelve per cent. per annum until the same are paid. All penalties under this section, and under sections seven, forty-seven, fifty, and fifty-two, may also be enforced, and all taxes under said sections forty, forty-two, forty-three, forty-five, forty-seven, fifty, fifty-one, and fifty-two, may also be collected by information brought in the supreme judicial court at the relation of the treasurer of the commonwealth, and upon such information the court may issue an injunction restraining the further prosecution of the business of the corporation, company, copartnership, or asso-
144 ciation, until all such taxes due or penalties incurred shall be paid, with interest at the rate aforesaid, and costs. In any proceeding under this section the certificate of the tax commissioner or his deputy shall be competent evidence of all determinations made and notices given by him and of all values, amounts, and other facts required to be fixed or ascertained by him under this chapter."

"SECT. 61. Any party aggrieved by the decision of the tax commissioner arising under the provisions of sections twenty-five to fifty-

eight inclusive, excepting corporations named in section forty-six, may apply to the board of appeal constituted under the provisions of the following section for a correction of the same."

SECT. 62. The treasurer and the auditor of the commonwealth, together with one member of the council to be named by the governor, shall constitute a board of appeal, to which board any party aggrieved by a decision of the tax commissioner upon any matter arising under this chapter, from his decision upon which an appeal is given, may apply within ten days after notice of such decision for a correction of the same. Upon such appeal said board shall, as soon as may be, give a hearing to such party, and shall thereupon decide the matter in question, and notify the tax commissioner and the party appealing; and such decision shall be final and conclusive as to the rights of the parties affected, although payments may have been made as required by the decision of the tax commissioner appealed from. Any overpayment of tax, determined by the decision of said board of appeal, shall be reimbursed from the treasury of the commonwealth."

"CHAPTER 109, SECTION 1. Every company incorporated for the transmission of intelligence by electricity shall possess the powers and privileges, and be subject to the duties, restrictions, and liabilities, prescribed in this chapter."

"SECT. 2. Each company may, under the provisions of the following section, construct lines of electric telegraph upon and along the highways and public roads, and across any waters within the commonwealth, by the erection of the posts, piers, abutments, and other fixtures (except bridges) necessary to sustain the wires of its lines; but shall not incommode the public use of highways or public roads, nor endanger or interrupt the navigation of any waters."

"SECT. 3. The mayor and aldermen or selectmen of a place through which the lines of a company are to pass shall give the company a writing specifying where the posts may be located, the kind of posts, and the height at which and the place where the wires may run. After the erection of the lines, having first given the company or its agents opportunity to be heard, they may direct any alteration in the location or erection of the posts, piers, or abutments, and in the height of the wires. Such specifications and decisions shall be recorded in the records of the city or town."

145 The nature of the proceeding, in the valuation of the property of the company for the purposes of the assessment of the tax, are sufficiently stated in the Report of the Examiner *infra*.

The bill averred that the taxes had not been paid, and were still due and owing to the Commonwealth, and prayed the court "to order and decree that said sum due for taxes as aforesaid shall be paid to said Commonwealth by the said corporation, with interest thereon, together with the costs of this information, and to grant unto your informant a writ of injunction, issuing out of and under the seal of this honorable court, to be directed to the said corporation and its officers, agents, and servants, commanding them and each of them absolutely to desist and refrain from the further prosecution of the business of said corporation until said sums, due to the said Commonwealth as aforesaid for taxes as aforesaid shall have been fully paid, with interest and costs," and for further and other relief.

On motion of the defendant the cause was, on May 13, 1886, removed to the Circuit Court of the United States, and on the 29th day of the same May the answer of the defendant was filed in that court.

The answer set forth that the defendant was a corporation organized in the State of New York, and under the laws of that State; that it owned, controlled, and used many lines of telegraph in various parts of the United States, and in the State of Massachusetts, largely in that State over and along the post roads of the United States which had been declared to be such and over, under, and across navigable waters of the United States in or adjoining that State, and that on the 5th day of June, 1867, it had accepted the provisions and obligations of the act of July 24, 1866, 14 Stat. 221, c. 230

146 (now Rev. Stat. sec. 5263); (*) that thereby it became entitled to construct and maintain its lines over the post roads and over, under, and across the navigable waters of the United States, and became bound to transmit the telegrams of the United States over its lines at rates to be fixed by the Postmaster General, and that no state legislation could prevent its occupation of post roads for that purpose; that its lines extend to and from Massachusetts to other states, and to Washington, and connect with the lines of other companies doing business in this country and outside of the United States and beyond the seas; that while it was operating its lines in Massachusetts it was called upon to make returns of its capital stock, &c., to the tax commissioner of the State according to the provisions of secs. 38, 39, 40, 41, and 42 of c. 13 of the Public Statutes of the State, and made a return as follows:

(*) See *infra*, page 547, for this statute.

"Western Union Telegraph Company.

"TREASURER'S OFFICE, NEW YORK, *June* 25, 1885.

"Hon. Daniel A. Gleason, tax commissioner of the Commonwealth of Massachusetts.

"SIR: I, Roswell H. Rochester, treasurer of the Western Union Telegraph Company, hereby return that on the first day of May, 1885, said corporation held its principal place of business at the City of New York.

"Its capital stock was	$80,000,000.00
The whole number of its shares was 800,000.	
The par value of each share was	100.00
The market value of each share was	59.37½
The value of the real estate owned by the corporation without the State of Massachusetts was	3,058,933.82
147 The value of the real estate owned by the corporation within the State of Massachusetts was nothing.	
The total number of miles of line owned or leased was 146,052.60.	
Of which the number of miles (not on post roads of the United States and excluding 2,334.55 miles which were on post roads of the United States) within the State of Massachusetts was 498.50.	
Total property, 800,000 shares, at $59.37½ per share	47,500,000.00
This includes—	
Real Estate	3,058,933.82
Two hundred and nine three-fourth shares held by this company unissued, at $59.37½	12,453.90
Stocks in other companies outside of our system, not included in above statement of miles of line.	8,773,622.70
Balance value of 146,052.60 miles of line	35,654,989.58
Value, at same rate, of said 498.50 miles as the valuation of the corporate franchise of said company for taxation under the laws of Massachusetts	121,695.97

"This return includes the lines and property of the American Union Telegraph Company, the Franklin Telegraph Company, the Mutual Union Telegraph Company, and the Gold and Stock Telegraph Company as part of the Western Union lines.

"Respectfully yours, R. H. ROCHESTER,
Treasurer."

148 The answer then set forth the action of the tax commissioner upon this return and respecting the valuation of the property of the company for the purposes of taxation (*); and continued:

(*) For these proceedings see the Report of the Examiner, *infra*, pp. 539, 542.

"And this respondent does not deny but admits that its property in said State of Massachusetts is subject to taxation the same as other property, and that it may be taxed in a proper way thereon, yet it respectfully submits and avers that this respondent does not derive its existence from the laws of said State, or derive the right to have and exercise its said franchises, rights and privileges from said State, or hold them subject to its control, and that said franchise tax is clearly not a tax on its property in any legal sense, and cannot be held valid as such; that it is in the nature of an excise on the exercise of all the franchises, rights and privileges enjoyed by this respondent in the conduct of its business, and a tax on its operations in such exercise; that, while it is claimed by the officers of said State and by said attorney general that the laws imposing said tax are founded on the alleged right of said State to refuse to this respondent the right or permission to transact its business or exercise its functions, franchises, rights and privileges within said State, except for such price and on such terms and conditions, including the payment of such taxes as said State may see fit to prescribe and assess, and to compel the performance of, and to exclude this respondent from such transaction or exercise if the same are not performed and obeyed:

"Yet this respondent avers that said franchise tax has not and cannot have this or any legal foundation, and that it includes and is a tax or assessment on the rights, privileges and franchises
149 granted and secured to this respondent by the United States by the said act of Congress, and on the use thereof by this respondent as an instrument of commerce and as a government agent for the transmission of public business by means thereof, and on its operation in said State, which said State cannot limit, control, refuse, or tax.

"That even if said tax could in any form be so properly levied and assessed on the use of such rights and privileges for other purposes, which this respondent denies, it is not only impossible in this case to indicate or designate the portion of the burden of said franchise tax on said use as an instrument of commerce and as a government agent or on any use for other purposes, but that the mode of valuation thereof specifically prescribed by said act does in terms include and designate as a subject of taxation the franchise exercised on that portion of this respondent's lines constructed, maintained and used in the exercise and enjoyment of said rights and privileges, and that the said tax bears upon the whole machine without distinction and indistinguishably as well upon the faculty of receiving and transmitting the messages of the government of said United States as on that of receiving and transmitting messages of individuals, and as well upon the faculty of receiving and transmitting through said State messages sent and received in and for the purposes of foreign and interstate commerce, as upon that of receiving and transmitting other messages wholly within said State.

"And this respondent further avers that if said franchise tax could in form be legally so levied and assessed as to operate upon only something legally subject to taxation by said State by any mode of

estimate or valuation resembling that prescribed by said laws,
150 based upon a valuation of its shares, deducting real estate
locally taxed in said State, it would be and is unjust and not
proportional not to deduct from said valuation the amount of real
estate owned by and subject to local taxation and actually taxed out
of said State, both because the laws of said State allow such deduction
from the valuation under said laws for like taxation of the franchises
of other corporations organized or chartered within and doing busi-
ness within and without said State, and because otherwise said State
would assume and does assume in effect to tax and assess real estate
situated in and subject to taxation and actually taxed by other States
and jurisdictions."

The plaintiff filed a replication to this answer; whereupon the cause was referred to Francis S. Fiske, Esq., "as Examiner, to take and report the evidence of both parties therein, and such questions of law arising thereon as either party shall desire." The Examiner's report was filed May 4, 1887, as follows:

"I, Francis S. Fiske, having been appointed by the Court a special examiner in the above-named case, report:

"That the information was filed in the Supreme Judicial Court of the State April 27, 1886, and removed to this court by the defendant; that the defendant is a telegraph company organized under the laws of the State of New York before the passage of the act of the Congress of the United States of July twenty-fourth, eighteen hundred and sixty-six, entitled 'An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes' (Rev. Stat., sec. 5263, *et seq.*), and is a corporation organized for purposes of
151 business and profit, having a capital stock divided into shares, which filed with the Postmaster-General of the United States its written acceptance of the restrictions and obligations required by law in accordance with said act on or about the twelfth day of June, 1867, and has ever since been in existence and operation.

"That on and before and since the first day of May, 1885, it has owned, controlled and used, under lease or otherwise, a line or lines of telegraph within said Commonwealth as part of a system of 145,052 and 60/100 miles of line extending throughout the United States, part of Canada, and to Cuba and England by submarine ocean cable, connecting with lines owned and established by the Government of the United States for public purposes.

That on the sixteenth day of September, in said year 1885, after notice had been given to said Commonwealth of said filing and of other matters mentioned in the notice hereto append, as below stated, and a return made by said company, under section 42 of chapter 13 of the Public Statutes of said Commonwealth, copies of which notice and return are appended (see pp. 536, 537, *supra*), the tax commissioner of said Commonwealth, in the manner required by its laws, estimated the fair cash valuation of all the shares constituting the capital stock of said corporation on said first day of May at $47,500,000, and allowed as credits to said corporation out of said $47,500,000 the sum or value of $8,786,076.

For 209¾ shares held by the company unissued, at $59.37½	$12,453.90
For stock in other companies outside of its system not included in above statement of miles of line..	8,773,622.70
	$8,786,076.60

152 "And determined the total number (or whole length) of the miles of lines of said defendant to be 146,052.60 as aforesaid and 143,219.55 miles thereof, which included said cables, to be beyond the limits of said Commonwealth.

"That the rate determined under the fortieth section of said thirteenth chapter of said Public Statutes for the taxation of the corporate franchise therein mentioned was, in and for the year 1885, $14.14 each for each $1,000 of valuation.

"That said commissioner, being of opinion that the valuation of the corporate franchise of said defendant for taxation by said Commonwealth was to be ascertained by deducting

from said	$47,500,000.00
The said	8,786,076.00
Thus leaving	$38,713,924.00
And then taking as the total number of said line or lines	146,052.60
And as the number thereof in said Commonwealth..	2,833.05

without regard to the question whether any thereof were or were not on post roads, declared such by law, or navigable streams or waters of the United States, considered that the valuation of the corporate franchise of said defendant subject to be taxed in said Commonwealth at said rate was $\frac{2,833.05}{140,052.60}$ of said $38,713,924, or in all ($750,952) seven hundred and fifty thousand nine hundred and fifty-two dollars, and assessed a tax thereon of ($10,618.46) ten thousand six hundred and eighteen and 46/1-00 dollars to said company. sand six hundred and eighteen and 46/100 dollars to said company.

"That in fact more than 2,334.55 miles of said line within said Commonwealth, part of said 2,833.05 miles, were on, over, under, or across said post roads—that is to say, railroads or highways
153 made by law such post roads—or such streams or waters.

"That before and during said year and since said defendant has continually transmitted over said lines on said post roads, streams, or waters between the several departments of the United States government and their officers and agents or as provided by sec. 221 of the Revised Statutes of the United States, at rates fixed by the Postmaster-General, as required by said act of Congress or title LXV. of said section, telegraphic communications and messages for the government of the United States, including those for the signal service relating to the weather, storms, etc., and also commercial and business messages for purposes of foreign and interstate commerce from and to, into through, and over and between said State of Massachusetts and all the other States and Territories of the United States, the city

of Washington, and the District of Columbia, and to and from foreign countries by ocean submarine cables both for said government and for many private individuals and corporations resident and located as well out of as in said State.

"That it is impossible for said company to determine what portion of any sums received by it was received for services performed in said State in the transmission through the same or any part thereof of messages or communications received or delivered out of it or not on lines over said post roads, streams, or waters, but that the largest part, or approximately seventy per cent., of said sums was for messages received or delivered out of said State.

"That said defendant, on said first day of May, 1885, owned a large amount of real estate located and subject to local taxation out of said State of Massachusetts, on which there was assessed and paid
154 by it a large amount (over $48,000) of taxes, besides other taxes.

"That the amount or value of said real estate was not clearly shown, but it was shown that the cost of land and buildings thereon owned by the defendant and of buildings so owned on land not so owned out of said State was over $3,000,000; and it was agreed by the said parties that if it appeared and became material upon any final decision in this case to fix the amount or value of said real estate, or the taxes thereon, or the amount received for any class of messages, and it was not agreed upon by them, the same should be determined on further hearing by the examiner.

"That no deduction or allowance was made in assessing said tax or in ascertaining the valuation of said franchise for taxation as aforesaid on account of said real estate, land, or buildings, or the taxes paid thereon, or for anything not above specifically stated.

"That notice was duly given to said defendant of said tax, and demand made therefor as required by said chapter, but said defendant protested against said assessment and tax and declined to pay the same; whereupon this information was filed."

The cause was heard on these pleadings and upon the report of the Examiner, and the court on the 28th November, 1887, made a final decree therein:

"That the facts set forth in the examiner's report filed in this cause are true.

"That in those facts the method of valuation, assessment, and taxation provided by the laws of Massachusetts upon the franchise of the defendant corporation is not, as was claimed, and contended by said defendant, illegal and unconstitutional under the con-
155 stitution and laws either of the State of Massachusetts or of the United States—that is to say, either under the Constitution of the United States, Article I, section 8; Article III, section 2; Article VI; Amendments V and XIV; Revised Statutes of the United States, sections 5263, 5264, 5265, 5266, 5267, 5268, 5269, including a revision and consolidation of the act of July 24, 1866, chapter 230, accepted by the defendant before the revision of section 221; or under the constitution of said State, Part I, art. X; Part II, chapter I, section IV; or chapter 13 of its Public Statutes, but was and is in con-

formity with and authorized by said constitutions and laws, and that therefore the sum claimed by the plaintiff to be due for taxes, to wit, $10,618.46, be paid to said State by said corporation, with interest thereon, and that an injunction shall be issued out of and under the seal of this court, directed to said corporation and its officers, agents, and servants, commanding them and each of them absolutely to desist and refrain from the further prosecution of the business of said corporation until said sums due to the said Commonwealth as aforesaid for taxes as aforesaid shall have been fully paid, with interest and costs, unless the said sum is paid by said defendant as aforesaid within thirty days from the entry hereof."

From this decree the defendant appealed.

Mr. George S. Hale (with whom were Mr. Charles W. Wells and Mr. Willard Brown on the brief).

I. Telegraph companies, which have accepted the act of Congress, are, as to government business, government agencies, and so far as a state tax on a company is on, or affects, the means employed by the government of the United States to exercise its consti-
156 tutional powers, it is void. Western Union Telegraph Co. *v.* Texas, 105 U. S., 460; Osborn *v.* Bank of the United States, 9 Wheat. 738; Union Pacific Railroad *v.* Peniston, 18 Wall. 5; McCulloch *v.* Maryland, 4 Wheat. 316; Bank of Commerce *v.* New York, 2 Black, 620; Weston *v.* Charleston, 2 Pet. 449; Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S. 1; Mayor *v.* Charleston, 36 Georgia, 460; Wabash, &c., Railway Co. *v.* Illinois, 118 U. S. 557; Fargo *v.* Michigan, 121 U. S. 230; Pickard *v.* Pullman Southern Car Co., 117 U. S. 34; Manufacturers' Ins. Co. *v.* Loud, 99 Mass., 146; Hamilton Manufacturing Co. *v.* Massachusetts, 6 Wall. 632; Provident Institution *v.* Massachusetts, 6 Wall. 611; Portland Bank *v.* Apthorp, 12 Mass. 252; Commonwealth *v.* People's Five Cent Savings Bank, 5 Allen, 428; Bank of Augusta *v.* Earle, 13 Pet. 519; Attorney General *v.* Bay State Mining Co., 99 Mass. 148; Gleason *v.* McKay, 134 Mass., 419; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196; Philadelphia Steamship Co. *v.* Pennsylvania, 122 U. S. 326; People *v.* Weaver, 100 U. S. 539; Robbins *v.* Shelby County Taxing District, 120 U. S. 489.

II. The omission to deduct from the total valuation the real estate located and subject to local taxation in other States, renders the tax excessive and invalid. The Delaware Railroad Tax, 18 Wall. 206; Santa Clara County *v.* Southern Pacific Railroad, 118 U. S. 394; Libby *v.* Burnham, 15 Mass. 144; Stetson *v.* Kempton, 13 Mass. 272.

Mr. Andrew J. Waterman, Attorney General of the Commonwealth of Massachusetts, and Mr. Henry C. Bliss, Assistant Attorney General of that State cited: Portland Bank *v.* Apthorp, 12 Mass. 252; Commonwealth *v.* Savings Bank, 5 Allen, 428; Common-
157 wealth *v.* Hamilton Manuf. Co., 12 Allen, 298, 305, 309; Queen *v.* Arnaud, 9 Q. B. 806, 817; Utica *v.* Churchill, 33 N. Y. 161, 237; Van Allen *v.* Assessors, 3 Wall. 573; Attorney General *v.* Bay State Mining Co., 99 Mass. 148; Bank of Commerce *v.* New York, 2 Black, 620, 630; Delaware Railroad Tax Case, 18 Wall.

206, 225; State Tax on Railway Gross Receipts, 15 Wall. 284, 293; Wabash, &c., Railroad *v.* Illinois, 118 U. S. 557, 594; Sherlock *v.* Alling, 93 U. S. 99; Munn *v.* Illinois, 94 U. S. 113; Chicago, Burlington, &c. Railroad *v.* Iowa, 94 U. S. 155; Paul *v.* Virginia, 8 Wall. 168; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 209; Railroad Co. *v.* Peniston, 18 Wall. 5, 34; Commonwealth *v.* Lancaster Savings Bank, 123 Mass. 493, 495; Woodruff *v.* Parhams, 8 Wall. 123; Manufacturers' Ins. Co. *v.* Loud, 99 Mass. 146; Oliver *v.* Washington Mills, 11 Allen, 268, 279; Hamilton Co. *v.* Massachusetts, 6 Wall. 632, 639; Dickey *v.* Turnpike Road Co., 7 Dana, 113; Thomson *v.* Pacific Railroad Company, 9 Wall. 579, 590; Fargo *v.* Michigan, 121 U. S. 230; Cooley *v.* Philadelphia, 12 How. 299; *Ex Parte* McNeil, 13 Wall. 236; Osborne *v.* Mobile, 16 Wall. 479, 481; McCulloch *v.* Maryland, 4 Wheat. 316, 429; Dwight *v.* Boston, 12 Allen, 316; S. C. 90 Am. Dec. 149; Railroad Company *v.* Fuller, 17 Wall. 560, 568.

Mr. Justice MILLER delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Massachusetts.

The action was commenced in the Supreme Judicial Court of Massachusetts, sitting in equity, by an information on behalf of the Commonwealth, by its Attorney General, at the relation of the Treasurer thereof, Alanson W. Beard. It was afterwards removed,
158 upon motion of the defendant, the Western Union Telegraph Company, into the Circuit Court of the United States. The object of the information was to enforce the collection of a tax levied by the proper authorities of the State upon the telegraph company, and to enjoin it from the further operation of its telegraph lines within the territorial limits of the Commonwealth until that tax was paid.

The defendant company is a corporation organized under the laws of the State of New York, having its capital stock divided into shares. The tax assessed by the treasurer of the Commonwealth of Massachusetts was based upon an estimate of $750,952 as the taxable value of the shares of the corporation apportioned to that State, the rate of taxation having been determined for that year, 1885, at $14.14 for and upon each $1,000 of valuation. The mode by which this taxable valuation was arrived at was this: The treasurer ascertained from the officers of the telegraph company that the valuation of its entire capital stock was $17,500,000, from which were deducted the credits proper to be allowed in determining the assessable value, leaving $38,713,924 as the total valuation of said stock liable to taxation. It was then ascertained that the total number of miles of line of said corporation in all the States and Territories of this country was 146,052.60, of which 143,219.55 were without the limits of the Commonwealth of Massachusetts, leaving 2,833.05 miles within its boundaries. Taking these figures the Treasurer of the State assessed the value of that portion of the capital stock of this company which, under this calculation, would fall within the Commonwealth of Massachusetts at the sum of $750,952. The amount thus arrived at,

at the rate of $14.14 upon each $1,000 of valuation, produced the sum of $10,618.46 as the amount of the tax claimed to be
159 due and payable to the treasurer of said Commonwealth by that corporation. This sum was demanded of the telegraph company, but it refused to pay the same.

The answer of the defendant corporation set up that of its 2,833.05 miles of line within the State of Massachusetts more than 2,334.55 miles were over, under, or across post-roads, made such by the United States, leaving only 498.50 miles not over or along such post-roads, on which the company offered to pay the proportion of the tax assessed according to mileage by the state authorities.

The main ground on which the telegraph company resisted the payment of the tax alleged to be due, and on which probably the case was removed from the state court into the Circuit Court of the United States, is that it is a violation of the rights conferred on the company by the act of July 24, 1866, now Title LXV, §§ 5263 to 5269 of the Revised Statutes. The defendant alleges that it had accepted the provisions of that law, and filed a notification of such acceptance with the Postmaster General of the United States, June 8, 1867. The argument is, therefore, that by virtue of sec. 5263 the company has a right to exercise its functions of telegraphing over so much of its lines as is connected with the military and post-roads of the United States which have been declared to be such by law without being subject to taxation therefor by the state authorities. That section reads as follows:

"SEC. 5263. Any telegraph company now organized, or which may hereafter be organized under the laws of any State, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the
160 United States which have been or may hereafter be declared such by law, and over, under, or across, the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post-roads."

It is urged that this section, upon its acceptance by this corporation or any of like character, confers a right to do the business of telegraphing which is transacted over the lines so constructed over or along such post-roads, without liability to taxation by the State. The argument is very much pressed that it is a tax upon the franchise of the company, which franchise being derived from the United States by virtue of the statute above recited cannot be taxed by a State, and counsel for appellant occasionally speak of the tax authorized by the law of Massachusetts upon this as well as all other corporations doing business within its territory, whether organized under its laws or not, as a tax upon their franchises. But by whatever name it may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the corporation. The laws of that Commonwealth attempt to ascertain the just amount which any corporation engaged in business within its limits shall pay

as a contribution to the support of its government upon the amount and value of the capital so employed by it therein.

The telegraph company, which is the defendant here, derived its franchise to be a corporation and to exercise the function of telegraphing from the State of New York. It owes its existence, its capacity to contract, its right to sue and be sued, and to exercise the business of telegraphy, to the laws of the State under which it is organized. But the privilege of running the lines of its wires

161 "through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States, * * * and over, under, or across the navigable streams or waters of the United States," is granted to it by the act of Congress. This, however, is merely a permissive statute, and there is no expression in it which implies that this permission to extend its lines along roads not built or owned by the United States, or over and under navigable streams, or over bridges not built or owned by the Federal government, carries with it any exemption from the ordinary burdens of taxation.

While the State could not interfere by any specific statute to prevent a corporation from placing its lines along these post-roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the State for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person would be. It never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support.

In the case of Telegraph Co. *v.* Texas, 105 U. S. 460, this question was very fully considered, and while a tax imposed upon every telegram passing over its lines, whether entirely within the State or coming from without its limits, or going from the State out of it, was held to be void so far as related to messages passing through more than one State, as an interference with or regulation

162 of commerce and with the act of Congress we have just been considering, it was distinctly pointed out that if it could be ascertained what telegrams were confined wholly within the State a tax on those might be imposed by it.

In that case the Chief Justice, delivering the opinion of the court, said:

"The Western Union Telegraph Company having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a government agent for the transmission of messages on public business. Its property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business. The precise question now presented is whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out

of the State, or sent by public officers on the business of the United States." pp. 464, 465.

This authority of the government gives to this telegraph company, as well as to all others of a similar character who accept its provisions, the right to run their lines over the roads and bridges which have been declared to be post-roads of the United States. If the principle now contended for be sound every railroad in the country should be exempt from taxation because they have all been declared to be post-roads and the same reasoning would apply with equal force to every bridge and navigable stream throughout the land. And if they were not exempt from the burden of taxation simply because they were post-roads, they would be so relieved whenever a telegraph company chose to make use of one of these roads or bridges along or over which to run its lines. It was to provide against the recognition of such a principle that this court, in the case above cited,
163 while holding that telegrams themselves coming from without a State or sent out of it as a part of their conveyance could not be taxed by the State specifically, nevertheless used the language that "its property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business."

A still stronger case in the same direction is that of Railroad Company *v.* Peniston, 18 Wall. 5. The plaintiff in that action, the Union Pacific Railroad Company, was incorporated under a law of the United States. The State of Nebraska, under a revenue law passed by its legislature, undertook to lay a tax upon the property of that company which was used or embraced within the limits of its territory, upon a valuation of $16,000 per mile. The property thus rated and taxed consisted of its road beds, depots, stations, *telegraph poles, wires,* bridges, etc. It will be here observed that a part of the valuation on which this tax was levied was made up of the telegraph poles and wires belonging to the company.

The argument was pressed in that case that the railroad company held its franchises from the government of the United States, and that its property could not be taxed by the State, but this court held otherwise, and in the opinion used this language:

"It is often a difficult question whether a tax imposed by a State does in fact invade the domain of the general government, or interfere with its operations to such an extent, or in such a manner, as to render it unwarranted. It cannot be that a State tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the Constitution. To hold that
164 would be to deny to the States all power to tax persons or property. Every tax levied by a State withdraws from the reach of Federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which Federal taxes may be laid. The States are, and they must ever be, co-existent with the national government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be ex-

tended so far as to destroy the necessary powers of the States, or prevent their efficient exercise" pp. 30, 31.

In the case of Thomson *v.* Pacific Railroad Co., 9 Wall. 579, is then cited, where it was held that the property of that company was not exempt from state taxation, though their railroad was a part of a system of roads constructed under the authority and direction of the United States, and largely for the uses and to serve the purposes of the general government. The court further said:

"A very large proportion of the property within the States is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. United States mails, troops and munitions of war are carried upon almost every railroad. *Telegraph lines* are employed in the national service. So are steamboats, horses, stage coaches, foundries, ship yards and multitudes of manufeaturing establishments. They are the property of natural persons or of corporations, who are agents or instruments of the general government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to
165 the revenue of the States it is manifest the state governments would be paralyzed. While it is of the utmost importance that all the powers vested by the Constitution of the Untied States in the general government should be preserved in full efficiency, and while recent events have called for the most unembarrased exercise of many of those powers, it has never been decided that state taxation of such property is impliedly prohibited." p. 33.

In National Bank *v.* Commonwealth, 9 Wall. 353, which was a case of a tax levied upon the shares of a national bank, the same objection in regard to a tax by state authority was pressed upon the court, but this court said that the principle of exemption of Federal agencies from state taxation has a limitation growing out of the necessity upon which the principle is founded. "That limitation is, that the agencies of the Federal government are only exempted from state legislation, so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers into an unauthorized and unjustifiable invasion of the rights of the States. * * * So of the banks. They are subject to the laws of the State and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State law. Their acquisition and transfer of property, their right to collect their debts and their liability to be sued for debts are all based on State laws. It is only when the State law incapacitates the banks from discharging
166 their duties to the government that it becomes unconstitutional. We do not see the remotest probability of this in their being required to pay the tax which their stockholders owe to the State for the shares of their capital stock, when the law of the Federal government authorized the tax." p. 362.

The tax in the present case, though nominally upon the shares of the capital stock of the company, is in fact a tax upon that organization on account of property owned and used by it in the State of Massachusetts, and the proportion of the length of its lines in that State to their entire length throughout the whole country is made the basis for ascertaining the value of that property. We do not think that such a tax is forbidden by the acceptance on the part of the telegraph company of the rights conferred by sec. 5263 of the Revised Statutes, or by the Commerce clause of the Constitution.

It is urged against this tax that in ascertaining the value of the stock no deduction is made on account of the value of real estate and machinery situated and subject to local taxation outside of the Commonwealth of Massachusetts. The report of Examiner Fiske to whom the matter was referred to find the facts, states that the amount of the value of said real estate outside of its jurisdiction was not clearly shown, but it did appear that the cost of land and buildings belonging to the company and entirely without that State was over three millions of dollars. In the statement of the treasurer of the company it is said that the value of real estate owned by the company with the State of Massachusetts was nothing. Since the corporation was only taxed for that proportion of its shares of capital stock which was supposed to be taxable in that State on the calculation above referred to, and since no real estate of the corporation was
167 owned or taxed within its limits, we do not see why any deduction should be made from the proportion of the capital stock which is taxed by its authorities. But if this were otherwise we do not feel called upon to defend all the items and rules by which they arrived at the taxable value on which its ratio of percentage of taxation should be assessed and even in this case, which comes from the Circuit Court, and not from that of the State, we think it should appear that the corporation is injured by some principle or rule of the law not equally applicable to other objects of taxation of like character. Since, therefore, this statute of Massachusetts is intended to govern the taxation of all corporations therein, and doing business within its territory, whether organized under its own laws or those of some other State, and since the principle is one which we cannot pronounce to be an unfair or an unjust one, we do not feel called upon to hold the tax void, because we might have adopted a different system had we been called upon to accomplish the same result.

It is very clear to us when we consider the limited territorial extent of Massachusetts, and the proportion of the length of the lines of this company in that State to its business done therein, with its great population and business activity, that the rule adopted to ascertain the amount of the value of the capital engaged in that business within its boundaries, on which the tax should be assessed, is not unfavorable to the corporation, so that the details of the method by which this was determined have not exceeded the fair range of legislative discretion. We do not think that it follows necessarily, or as a fair argument from the facts stated in the case, that there was injustice in the assessment for taxation.

168 The result of these views is that the tax assessed against the plaintiff in error is a valid tax; that the judgment of the court below, "That the sum claimed by the plaintiff (below) to be due for taxes, to wit, $10,618.46, be paid to said State by said corporation, with interest thereon," is without error, and so much of said judgment is hereby affirmed.

The decree or judgment, however, proceeds and awards an injunction against the company in the following language, added to that above extracted: "and that an injunction shall be issued out of and under the seal of this court, directed to said corporation and its officers, agents, and servants, commanding them, and each of them, absolutely to desist and refrain from the further prosecution of the business of said corporation until said sums due to the said Commonwealth for taxes, as aforesaid, shall have been fully paid, with interest and costs, unless the said sum is paid by said defendant within thirty days from the entry hereof."

The effect of this injunction, if obeyed, is to utterly suspend the business of the telegraph company and defeat all its operations within the State of Massachusetts. The act of Congress says that the company accepting its provisions "shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States." It is found in this case that 2334.55 miles of the company's lines, out of 2833.05, on which this tax is assessed, are along and over such post-roads, and, of course, the injunction prohibits the operation of the defendant's telegraph over these lines, nearly all it has in the State.

169 If the Congress of the United States had authority to say that the company might construct and operate its telegraph over these lines, as we have repeatedly held it had, the State can have no authority to say it shall not be done. The injunction in this case, though ordered by a Circuit Court of the United States, is only granted by virtue of section 54 of chapter 13 of the Public Statutes of Massachusetts. If this statute is void, as we think it is, so far as it prescribes this injunction as a remedy to enforce the collection of its taxes by the decree of the court awarding it, the injunction is erroneous.

In holding this portion of section 54 of chapter 13 of the Massachusetts statutes to be void as applicable to this case, we do not deprive the State of the power to assess and collect the tax. If a resort to a judicial proceeding to collect it is deemed expedient, there remains to the court all the ordinary means of enforcing its judgment —executions, sequestration, and any other appropriate remedy in chancery.

That part of the decree of the Circuit Court which awards the injunction is, therefore, reversed, and the case is remanded to that court for further proceedings in conformity to this opinion.

Mr. Justice Bradley was not present at the argument of this case and took no part in its decision.

170 "EXHIBIT D" FOR IDENTIFICATION.

LAWS OF NEW JERSEY FOR THE TAXATION OF RAILROAD AND CANAL PROPERTY. GENERAL PUBLIC LAWS OF 1888, PAGES 269-287.

CHAPTER CCVIII.

"An Act to Revise and Amend 'An Act for the Taxation of Railroad and Canal Property,' Approved April Tenth, One Thousand Eight Hundred and Eighty-four.

1. *Be it enacted by the Senate and General Assembly of the State of New Jersey*, That all the property of any railroad or canal company not used for railroad or canal purposes shall be assessed and taxed by the same assessors and in the same manner and at the same rate as the taxable property of other owners in the same municipal division or taxing district; all other property of any railroad or canal company shall be assessed and taxed as hereinafter directed; the tax imposed by this act shall be in lieu of all other taxation upon the property subject to taxation under the provisions of this act; in all cases where the real estate, tangible personal property and franchise of any company are assessed and taxed under this act, the shares of stock and the bonds and certificates of indebtedness of such company shall not be taxed in the hands of the shareholders, boudholders or creditors, except as hereinafter provided.

2. (Amended by General Public Laws of 1891, Chapter 98, Page 165.)

3. *And be it enacted*, That it shall be the duty of the board of assessors to meet at Trenton on the first Tuesday of May in the present and each succeeding year and as often during each year and
171 at such places as their duties may require; they shall proceed to ascertain the true value of all property used for railroad or canal purposes of each railroad and of each canal company in this state, including its franchises, and they shall, in such ascertainment, ascertain:

I. The length and value of the main stem of each railroad, and of the water-way of each canal and the length of such main stem and water-way in each taxing district;

II. The value of the other real estate used for railroad or canal purposes in each taxing district in this state, including the road-bed (other than main stem), water-ways, reservoirs, tracks, buildings, water-tanks, water-works, riparian rights, docks, wharves and piers, and all other real estate, except lands not used for railroad or canal purposes;

III. The value of all the tangible personal property of each railroad and each canal company;

IV. The value of the remaining property, including the franchise.

The term 'main stem' of each railroad and of each canal company, as used in this act, shall be held to include the road-bed not exceeding

one hundred feet in width, with its rails and sleepers, depot buildings used for passengers connected therewith; the term 'water-way' shall be held to include the towing-path and berme-bank; the term 'taxing district' shall be held to designate any municipality, city, township, borough, incorporated town or village having power to assess and levy taxes, through which any road or canal may run; the term 'tangible personal property' shall be held to include the rolling-stock, cars, locomotives, ferryboats, all machinery, tools, other tangible per-
172 sonal property of any railroad company, and the floating, movable and other tangible personal property of any canal company, and also the locomotives and cars not belonging to such railroad company but built for its use and actually used in this state, or run under its control in this state by a sleeping-car company or other company; but the rolling stock of other persons or corporations temporarily used on any such road, and the floating or movable property temporarily used on such canal, but not forming part of the equipment of such road or canal, shall not be included in said term.

4. *And be it enacted,* That it shall be the duty of the assessors in all taxing districts where property of any railroad or canal company not used for railroad or canal purposes shall be assessed, if required so to do by the state board of assessors, to certify and send to the state board of assessors, on or before the second Monday of June in each year, a statement giving the description of such property and showing the assessed valuation thereof; the local assessors shall also, at the same time, certify and send to the state board of assessors a short description of all the real property in their respective taxing districts, used or owned for railroad or canal purposes, excepting the main stem or road-bed and track, not exceeding one hundred feet in width of each railroad, and the water-way, towing-path and berme-bank, not exceeding one hundred feet in width of each canal; the said assessors shall also certify to the said board the local rate of taxation for county and municipal purposes, as soon as the same shall be determined, and such other information obtained in the course of the performance of the duties of their office as the said board shall re-
173 quire of them, and for the service mentioned in this section the said local assessors shall receive three dollars per day for each day actually engaged in such service, to be paid on the warrant of the comptroller, on an affidavit of such service being filed in the office of said comptroller.

5. *And be it enacted,* That on the first Monday of July the board shall meet at the state house, in Trenton, and shall give a hearing to all companies interested, touching the valuation and assessment of their property; the board may adjourn from day to day, and may, if they see fit, require all arguments and communications to be presented in writing; when the first Monday of July shall fall on the fourth of fifth day of that month, the day of meeting shall be on the first Tuesday of July; all parties interested shall take notice of this hearing.

6. *And be it enacted,* That if the property of any railroad or canal company be leased to or operated by any other corporation, foreign

or domestic, the property of the lessor, or company whose property is operated, shall be subject to taxation in the manner hereinbefore directed, and if the lessee or operating company, being a foreign corporation, be the owner or possessor of any property in this state other than that which it derives from the lessor or company whose property is operated, it shall be assessed in respect of such property in like manner as any domestic railroad or canal company; any tangible personal property of such foreign company, if used or kept but a part of the time in this state, shall be assessed such proportionate part of its value as the time it is used or kept in this state during the calendar year preceding bears to the whole year.

7. *And be it enacted,* That in case any railroad or canal company shall claim any deduction on account of any mort-
174 gage or debt secured thereby, the said board are hereby required to allow the same in the cases in which and to the extent to which the assessor is authorized by law to allow a deduction in the case of any other owner of mortgaged lands, and thereupon the said mortgage and the estate of the mortgagee in the land mortgaged shall be subject to taxation in the same manner, as nearly as may be, and at the same rate on rates, as the estate of the mortgagor; the deduction shall be made *pro rata* from the valuation of each class of property covered by the mortgage, and the amount received from the taxation thereof shall be distributed as if the tax had been paid by the mortgagor without deduction.

8. *And be it enacted,* That if any railroad or canal company shall claim a deduction in any case in which such deduction could be claimed under the general laws of the state by other taxpayers for debts other than the deduction last hereinbefore mentioned, the said board are hereby required to allow the same and the said indebtedness so allowed shall be taxable as other debts owing to creditors residing in this state are taxable, and at the same rate; but the assessment thereof shall be made by said board and not by the local assessor, and the tax shall be paid to the treasurer of the state, to the credit of the fund derived from taxation under this act; the deduction shall be made *pro rata* from the valuation of each class of property of the debtor assessed, and shall be distributed as if the tax had been paid by the debtor without deduction; *provided,* that no deduction, either for mortgage or other indebtedness, shall be allowed unless the same shall be applied for in the report and statement
175 required to be made pursuant to this act, and unless the nature of the indebtedness, and the name and residence of the creditor, and the different taxing districts in which the mortgaged land lies, shall be specified, and unless the other terms imposed by the general laws of the state upon other taxpayers claiming deduction shall be complied with.

9. *And be it enacted,* That the state board of assessors shall, upon the completion of their valuation and assessment, proceed to compute the tax upon the entire assessed valuation of each railroad company and of each company, as ascertained by them; upon such valuation, each company shall pay to the state, for general state purposes, a tax at the rate of one-half of one per centum an-

nually upon each dollar of valuation, and the state board of assessors shall compute the same; each company shall also pay, in addition to said tax of one-half of one per centum, a tax at the local rate as fixed and assessed for county and municipal purposes upon other property in each taxing district, upon the valuation of its property in the several taxing districts, separately valued and assessed under the provisions of subdivision two of section three of this act, which tax shall also be computed by the state board of assessors; but the last-mentioned rate shall in no case exceed one per centum of the valuation of the property valued under the provisions of subdivision two of section three of this act; the sum of the estimates or computations for each company shall constitute the tax to be paid by each company and shall be a lien paramount to all other liens upon all the lands and tangible property and franchise of such company in this state; such lien shall take effect on the first day of November, and a copy of the valuation in detail of the property of each cor-
176 poration and of the tax assessed against the same under the provisions of this act shall be served upon the treasurer of such corporation or left at his office within ten days after the said first day of November, but the failure to serve any such notice shall not be held to invalidate any tax assessed or affect any lien created under this act; said tax shall be a debt due from such company to the state on that date, for which an action at law or in equity may be maintained and which shall be a preferred debt in case of insolvency; these remedies are in addition to the special proceedings provided for in this act.

10. *And be it enacted*, That the said board shall certify and report to the comptroller of the state, on or before the first day of December in each year, a statement of the assessed valuation of the property of each company in the state, and of the separate valuation of property in each taxing district, as made by them, the amount of tax payable by such company with respect to its property separately valued in each taxing district, and the aggregate assessed valuation, and the total tax levied upon each company; such statement shall be made separately for each company, and as to said property separately valued, shall be arranged by taxing districts in such manner as to be of easy reference, and shall be recorded in books in the office of the state comptroller, to be provided by him for that purpose, and shall be public records, subject to public inspection; and the amount of tax payable by each company, as shown by the said statements, shall be due and payable into the state treasury, on any day between the first day of November and the first day of February following; and the payment or collection thereof shall not be stayed by any writ or order of any court of law or equity; it
177 shall be the duty of the state treasurer to receive payment of the said taxes from the said companies; if the taxes of any company, or any portion thereof, remain unpaid on the first day of February following the levying thereof, such company shall be considered in default, and such taxes, or such unpaid portion thereof, shall thenceforth bear interest at the rate of one per centum for each month until paid, notwithstanding the prosecution of any

writ of certiorari or other remedy; *provided,* that so much of the tax as is applicable to general state uses, as hereinafter provided, may be paid in four equal installments on or before the first day of February, May and August and the fifteenth day of October in each year, and any unpaid portion or installment shall bear interest only from the date limited for the payment thereof, at one per centum for each month until paid, but this privilege of payment by installments shall not be granted unless the portion of the tax which is applicable to county and local purposes shall be paid before the first day of February following the levying thereof.

11. (Amended by General Public Laws of 1888, Chapter 259, Pages 376, 377.)

12. *And be it enacted,* That the said state board of assessors shall meet on the third Monday of November, at the state house, in Trenton, for the purpose of reviewing their assessment, and may adjourn from time to time until they shall have finished the hearing; upon the written complaint of any company or person considering itself or himself aggrieved, and specifying their grievance, or of the attorney general or of any member of the board, on behalf of the state, that the property of any company is assessed too low, either in the whole or in any taxing district, or that property has been omitted, they shall review the said assessment, and
178 correct the same as shall appear just; the attorney general shall attend such meeting of said board in person or by deputy; no complaint that any company or person is assessed too low, or that any property has been omitted, shall be acted upon until the company or person so assessed shall be notified of such complaint by five days' notice, to be served on such company or person by leaving the same at the office of such company or at the usual place of abode of such person, if a resident of this state; the board shall have the power to issue subpœnas and examine witnesses and call for the production of books and papers, and they shall be entitled to use their personal knowledge and judgment as to the value of property; they shall certify to the comptroller of the state all corrections which they shall make in any assessment; the proceedings provided for by this section shall be completed before the fifteenth day of January following the making of said assessment, and all complaints must be presented on or before the third Monday of November, or shall be deemed to have been waived.

13. *And be it enacted,* That if any company or person assessed, or if the attorney general on behalf of the state, or if the authorities of any taxing district, shall desire to contest the validity or amount of any tax levied upon property under the provisions of this act, such contest shall be made by certiorari, which may be granted on notice to the attorney-general or to the company or person assessed, on a proper case made, on such terms as the justice or court granting the writ may impose; upon such writ, relief may be had as well in cases where it is claimed that the amount of tax is excessive or insufficient, as in cases where it is claimed that the principle
179 upon which the assessment is made is erroneous; *provided,* that no writ of certiorari shall be granted unless the appli-

cant has applied to said board of assessors to review the assessment, as provided for in this act, nor shall any writ of certiorari be granted after the expiration of three months from the final determination of said board; if such writ shall be allowed, and if it shall be made to appear that any assessment is unlawful, excessive or insufficient, the court shall correct the same by whomsoever such writ shall be prosecuted, and reluce or increase it, as may be just, or refer it back to the board of assessors, who shall correct or re-assess the same, in accordance with the instructions of the court; in any suit or proceeding, except on such certiorari, the certificate and report of the state board of assessors shall be conclusive and shall have the force and effect of a judgment of a court of record having competent jurisdiction, and the proceedings whereon such certificate and report are founded, shall not be inquired into; no assessment or tax shall be set aside for misnomer of the owner of the property assessed; but the name may be corrected at any time by the board of assessors or court; the prosecutor of a writ of certiorari shall pay eight cents per folio to the state board of assessors and comptroller for returns made by them of proceedings under this act.

14. *And be it enacted,* That if any tax under the provisions of this act shall remain unpaid in whole or in part or ten days after the expiration of the time limited for payment thereof, it shall be the duty of the attorney general to apply forthwith to a justice of the supreme court for an order that said tax and the interest due thereon and a reasonable sum to be certified by said justice to be paid for the expense of said proceeding, shall be made a record of the supreme court, and judgment shall be entered therefor in the name of the State of New Jersey as plaintiff against said company, mortgagee or mortgagees, or other creditor, as defendant, which order shall be made upon the production of a certified copy from the comptroller of the certificate and report of the state board of assessors on file in his office, and of the certificate of the comptroller that said tax has not been paid; the attorney general shall also apply for an order that execution forthwith issue on said judgment, directed to a master of the court of chancery, to be named by said justice in said order; the said orders shall be respectively applied for on five days' notice to the company or mortgagee or mortgagees or other creditor concerned, which notice, in case of any company, shall be served in the same manner as a summons is directed by law to be served upon a corporation, and in all cases the proceedings shall be summary; in case a certiorari shall have been granted, on application of the attorney-general the orders above provided for shall be made and enforced without prejudice to the right of the state to enforce the payment of any additional amount of tax which may be imposed and to apply for a second judgment therefor; in case a certiorari shall have been granted on application of any company or mortgagees or other creditor taxed, and the tax shall have been reduced after the payment thereof, then the excess shall be repaid by the state upon the order of the court, and the state comptroller shall, upon such order, issue his warrant for such payment accordingly.

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15. *And be it enacted*, That the master in chancery to whom the execution shall be directed shall sell all the franchise, real estate and rolling stock and property of said company, and the
181 estate and interest of any mortgagees, and the debt due to any creditor for which a deduction has been allowed, or so much thereof as may be necessary to make the amount due on said tax judgment and the usual execution fees; the execution shall describe the property or debt aforesaid whereon the tax was assessed, and shall direct the sale thereof, and, generally, the sale of all other property of said company or person; such sale shall pass the absolute title to the franchise and property and debt aforesaid so sold, whereon the said tax was assessed or became a lien, free and clear of all liens, incumbrances and trusts of every nature, except taxes subsequently levied; in case of the sale of the estate and interest of any mortgagee it shall pass as well such estate as the interest of all bondholders and *cestuis que trust* for whose benefit said mortgage may have been given or may be held in trust or otherwise as to any other property of said company or persons, the judgment and execution shall constitute or become liens in the same manner and to the same extent as other judgments and executions of the supreme court; the sale, advertisements and proceedings under such executions shall be the same as under other executions of the supreme court; *provided, however,* that the company whose franchise, real estate, rolling stock and property, or any part thereof, has been so sold, and the mortgagee or mortgagees or any bondholder or other person having an interest in the estate and interest of the corporation or mortgagee which has been so sold, may, at any time within two years from and after any such sale, redeem the property so sold by tendering and paying to the purchaser or purchasers thereof the amount of the purchase-money by him or them paid, together with interest thereon at the rate of ten per centum per annum.

182 16. *And be it enacted,* That in order to ascertain the facts necessary for the discharge of their duties under this act, the said board shall use such lawful means as they may deem necessary; they may employ surveyors if they shall be dissatisfied with information otherwise attainable; they shall have the power of compelling the attendance of witnesses and the production of books and papers; and they may delegate such power to any member of their board authorized by them to investigate and report; they shall also use the returns hereinafter provided for, but such returns shall not be conclusive, and if any of said returns shall not be made, the board shall ascertain the necessary facts from the best information they can obtain, in such mode as they may find convenient, using their personal knowledge and judgment; the said assessors, or any one of them, shall have power to administer oaths and affirmations to any person to ascertain any facts which will enable them properly to perform the duties of their office, and they may reduce the statements of the person sworn to writing, and require him to swear and subscribe thereto, and may *ex parte,* apply for and obtain from any justice of the supreme court an order to compel any person to submit to examination in reference to such matters, and such justice

may punish any party as for a contempt who shall disobey any order made by such justice in the premises.

17. *And be it enacted,* That on or before the first Tuesday of May in each year, any person or company running, operating or constructing any railroad or canal in this state shall return to the state board of assessors statements or schedules, subscribed and sworn to by the president or other chief officer, before some officer
183 of the state authorized to administer oaths, of the property of such railroad or canal as it existed on the first day of January preceding, which, for each railroad, shall be as follows:

I. Of the real estate, specifying its extent and dimensions, which may be shown by a map or maps, setting out in detail the total length of the road, including branch and leased lines, the entire length in this state, and the length of double or side tracks; and the number, character and value of all buildings and structures in each county and in each taxing district through or in which it is located in this state, designating the main stem or road-bed and the width wherever it exceeds one hundred feet, and designating particularly any portion in each taxing district which is not used for railroad purposes, and which is locally assessed and taxed, and the value thereof;

II. Of the rolling stock and tangible personal property, giving the number of freight engines, passenger engines, passenger and freight cars, ferry boats and other movable property of every description, owned, used or hired, and the value thereof;

III. A statement or schedule, showing:

a. The amount of capital stock authorized and the number of shares into which such capital stock is divided:

b. The amount of capital stock paid up;

c. The market value, and if no market value, then the actual value of the shares of stock;

d. The total amount and the details and particulars of all indebtedness;

Such statements and schedules for canals shall be as follows:

I. Of all the real estate of said company, giving the depth
184 of water and dimensions of such canal, the length of the canal and of its feeders in the state, and the number, character and value of all locks, and of all buildings and other structures in each county and taxing district, designating particularly the width where it exceeds one hundred feet and designating any portion in each taxing district which is not used for canal purposes and which is locally assessed and taxed;

II. The floating movable property;

III. A statement or schedule containing all the particulars above enumerated and to be returned by railroad companies in the third statement or schedule; such statements or schedules shall be made in conformity with such instructions and forms as may be prescribed by the said board, and such further statements shall be furnished as said board shall require; the said board shall prescribe the form of the oath to the statements and schedules required by

this section, any person who shall make such oath falsely shall be guilty of perjury.

18. *And be it enacted,* That any railroad or canal company claiming exemption from taxation under this act, by reason of any alleged contract with the state, shall, together with and in addition to the return required by the last section, make a further return specifying the act or acts of the legislature by which such contract is claimed to have been created, and also specifying what portion of the property of said railroad or canal company is claimed to be exempt from taxation under this act and the particulars thereof, and the cost and value thereof; and such other particulars as the charter of said company and as the said board may require, and the particulars as to character, location and value of the
185 property, if any, admitted to be liable under this act; such return shall be in no manner conclusive as to any of the facts therein stated, but said board shall investigate and determine whether any, and if any, what portion of the property of such company is by contract beyond the power of the state to tax under this act; and shall ascertain the cost and value thereof, and shall estimate the tax to be paid by such company; the residue of said property shall be assessed, apportioned, and valued and taxed pursuant to the provisions of this act.

19. *And be it enacted,* That it shall not be lawful for any railroad or canal company having any contract with the state whereby any of their property is exempted from the taxation imposed by this act, to acquire and hold, directly or indirectly, any property in this state (except such property as such company may be entitled to acquire and hold pursuant to their said contract with this state, if such company has any charter provisions on this subject which the legislature cannot abrogate or repeal), unless such company shall, by a written instrument, executed under their common seal, approved by the attorney general and filed with the secretary of state, first agree that any and all property acquired by such company after the passage of this act shall be subject to taxation under the provisions of this act, or any amendments thereto, or any further act of the legislature, in which case such property shall be so subject.

20. *And be it enacted,* That if any person or corporation running, operating or constructing any railroad or canal shall wilfully neglect to make returns, as required by this act, such person or corporation shall forfeit as a penalty not more than ten thousand dollars, to be assessed by the jury, for each offence, to be recovered in any
186 proper form of action in the supreme court, in the name of the state, and paid into the state treasury; it shall be the duty of said board to certify any such default to the attorney-general of the state, and it shall be the duty of the attorney-general to prosecute for such penalty; any person who shall make falsely any oath required to be made under this act, and any person who shall testify falsely when called to testify under this act, shall be guilty of perjury, and on conviction thereof shall be liable to all the penalties prescribed by law therefor.

21. *And be it enacted,* That all railroad companies in this

state, which shall hereafter pay any taxes imposed by this act on any cars, hired, leased, run or used on the roads of such companies in this state, shall have a right of action against the company or persons owning such cars, for the taxes so paid, with interest thereon from date of payment, and may sue for and recover the same in any court of competent jurisdiction; but nothing in this section shall be so construed as to avoid the obligation of any contract relating to the payment of taxes heretofore entered into or made between any such company, its agents, or person owning such cars, and any such railroad company.

22. *And be it enacted,* That if any company shall be in default under this act in payment of the state tax aforesaid, any person having any interest in a mortgage or other lien on its franchises or property, may pay the state treasurer the amount of such state tax, and the interest due thereon, and receive from said treasurer a certificate of such payment, and such person shall thereupon be entitled to be repaid the amount of said tax and interest thereon at
187 the rate of twelve per centum per annum out of the first proceeds of any sale of the franchises or said property of said company, and such tax and interest thereon shall continue a lien on the franchise and property of the company for the benefit of the holder of or person interested in such mortgage or lien until paid by said company from the sale of its franchises or property; if any proceedings have been taken by the attorney-general to enforce the payment of said tax and interest thereon, then such holder of or person interested in a mortgage or lien paying such tax and interest shall pay such additional amount as a justice of the supreme court shall certify to be proper and reasonable for the expenses and services of the proceedings as far as they have progressed for the collection of said tax and interest thereon.

23. *And be it enacted,* That if any railroad or canal shall be owned or operated under a franchise by any individual or association not incorporated, the term 'company' used in this act shall apply to such owners or operators, and such property shall be assessed and taxed under the provisions of this act in the same manner as if operated by a company, and the persons operating or owning such railroad or canal shall make the returns required by this act to be made by companies.

24. *And be it enacted,* That the Attorney-General shall, with the approval of the governor and comptroller, have power to employ such assistant attorneys or counsel as may be necessary to protect and properly defend the interest of the state, in carrying out the provisions of this act; and such assistants shall be paid such compensation by the state as may be approved by the attorney-general and the comptroller; the state board of assessors shall have the
188 power to employ such assistants in making their valuation as may be necessary to complete the same in due time, and such assistants shall be paid such reasonable compensation for their services as the board and the governor shall approve.

25. *And be it enacted,* That any corporation having or claiming to have any contract with the state whereby any of its property

claimed to be exempted from the taxation imposed by this act, may, at its discretion, voluntarily pay to the state from year to year such sums of money as, added to the tax now assessable against such corporation under such alleged contract, will be equal to the tax assessable against such corporation under this act in respect to the property so claimed to be exempted, and such voluntary payment shall not be construed in any proceeding or suit to be a waiver by such corporation of its said alleged contract; *provided, however,* that nothing in this section, or in this act contained shall be construed or taken as an admission on the part of the state that any corporation is possessed of any contract or especial provision of the law on the subject of taxation which may not at any time be repealed or modified by the state.

26. *And be it enacted,* That if any section of this act shall, for any reason, be held to be unconstitutional or invalid, it shall not affect the other provisions of this act or any of them.

27. *And be it enacted,* That any corporation in this state having the right, by contract, to any different imposition of tax, either state or municipal, than that provided for in this act, are hereby authorized to execute and file in the office of the secretary of state an instrument, to be first approved by the attorney general, waiving the benefit of any such contract, whereupon they shall be
189 bound by the terms of this act, or any amendments hereto, or any further act of the legislature, and upon filing any such instrument the state agrees to surrender its right to take the property of any such corporation under any law now existing; *provided,* that any such corporation shall execute and file such instrument within six months from the time of the passage of this act.

28. *And be it enacted,* That in case any property of any railroad or canal company which has been or shall hereafter be in any year assessed by the local authorities of any taxing district has been or shall be also assessed by the state board of assessors as property used for railroad or canal purposes, the supreme court or any three justices thereof, to be assigned by the chief justice, shall determine, in a summary manner, the character of the property and whether used for railroad or canal purposes, and by which assessors the same has lawfully been assessed, which determination shall be made whether the taxes in question have been paid or not, and whether a certiorari to review either assessment has been granted or not; such determination shall be made under an order to show cause at a time and place to be therein designated, which order shall be granted by the chief justice of the supreme court upon application *ex parte* by any of the parties interested, namely, by the attorney general on behalf of the state, or by the owner of the property assessed, or by the authorities of the taxing district; and said order shall be served not less than ten days before the day fixed therein for the hearing, upon the said parties interested not making such application; depositions may be taken, on two days' notice by either party, to be used on such hearing; the justices before whom the matter shall be heard, may, if they see fit, view
190 the property in dispute, to guide them in their decision; the judgment of the court shall direct the cancellation or reduc-

tion of either assessment, as the character of the property may require, and shall make such order as to the return to the taxpayer of any tax or any portion thereof, that may have been paid to the state, or to any taxing district not entitled thereto, as such court shall deem just; the payment of costs may be directed in such manner as the court may deem equitable; the said judgment shall be conclusive and final in all collateral proceedings, but may be reviewed on writ of error by the court of errors and appeals.

29. *And be it enacted*, That if any corporation whose property and franchises have been or shall be valued and assessed under the provisions of the act to which this is a supplement, by the state board of assessors, shall pay or cause to be paid to the treasurer of the state the tax so assessed upon its property and its franchises at the times and in the same manner provided by law, or within fifteen days after the state board of assessors shall have made and declared their final revision of their valuations and assessments, that neither such payment nor the lapse of time in making application for a writ of certiorari shall be considered by any court or judge thereof as a reason why such corporation should not be entitled to such writ of certiorari upon any question adjudicated in favor of any corporation that may refuse to pay the taxes assessed aginst it, and that shall bring its writ of certiorari, to review the valuations and assessments within the time limited by the act to which this is a supplement; *provided*, application for writ of certiorari be made within six months after such question has been finally adjudicated,

191 and no other questions shall be considered on said writ.

30. *And be it enacted*, That this act shall be subject to amendments, alterations or repeal at the will of the legislature; the 'Act for the taxation of railroad and canal property,' approved April tenth, anno Domini eighteen hundred and eighty-four, which is by this act revised and amended, and the supplements thereto, approved February fifth and April fifth, anno Domini eighteen hundred and eighty-five, and all other acts inconsistent with the provisions of this act, are hereby repealed, except so far as herein re-enacted, but nothing in this repealer shall affect or impair the lien of any taxes heretofore assessed or any remedies for the collection of the same, or to surrender any remedies, powers, rights or privileges acquired by the state under said act hereby revised, or to relieve any person or corporation from any penalty imposed by said act and supplements, nor shall anything in this act be held to repeal the supplement to the said act hereby revised, which supplement was approved June tenth anno Domini eighteen hundred and eighty-six, nor shall this act affect the tenure of office of the present state board of assessors.

31. *And be it enacted*, That this act shall take effect immediately."

Approved March 27, 1888.

192 "EXHIBIT D" FOR IDENTIFICATION (Cont'd).

LAWS OF NEW JERSEY FOR THE TAXATION OF RAILROAD AND CANAL PROPERTY.

GENERAL PUBLIC LAWS OF 1888, PAGES 376, 377. CHAPTER CCLIX.

An Act to amend an act entitled "An act to revise and amend 'An act for the (taxation) of railroad and canal property,' approved April tenth, one thousand eight hundred and eighty-four," which was approved March twenty-seventh, one thousand eight hundred and eighty-eight.

1. *Be it Enacted by the Senate and General Assembly of the State of New Jersey,* That the eleventh section of an act to revise and amend an act entitled 'An act for the taxation of railroad and canal property,' approved April tenth, one thousand eight hundred and eighty-four, be and the same is hereby amended so as to read as follows:

2. *And be it enacted,* That the money collected under this act for the one-half of one per centum tax shall be applied to the uses of the State, according to law; the amount received for tax upon property separately assessed in the different taxing districts is hereby appropriated, and shall be allotted to the various taxing districts, giving to each district the amounts that was derived from the property of each railroad or canal company therein; the comptroller shall transmit to the collector of each county a certificate showing the amount allotted to the taxing districts therein, and shall draw his warrant upon the state treasury, in favor of the several county collectors, for the amounts allotted to their several counties, and the county collector shall forthwith pay to the collector, or other proper
193 officer of each taxing district, the amount allotted thereto, deducting, however, the amount due for county taxes from such taxing district; the amount thus paid to the county and taxing district shall be at the disposal of the proper authorities for public purposes; *provided, however,* that whenever the local city rate as fixed and assessed in any city exceeds one per centum of the ratables of such city, then in such case the comptroller shall transmit to the collector of taxes of said city a certificate showing the amount allotted to such city, and shall draw his warrant upon the state treasury in favor of the treasurer of such city for said amount; such warrant to be at the disposal of the board of such city having control of its finances, to be used for the municipal purposes of such city, such amount to be first applied to the purchase of such outstanding bonds or obligations of the city as can be bought below the par value thereof, and if no bonds or obligations can be bought below par, then such amount, or the balance, if any, shall be applied to the payment of such part of the city debt and interest falling due thereon as the said board having control of the finances of the city may determine.

2. *And be it enacted,* That this act shall take effect immediately.

Approved April 2, 1888.

194 "EXHIBIT D" FOR IDENTIFICATION (Cont'd).

LAWS OF NEW JERSEY FOR THE TAXATION OF RAILROAD AND CANAL PROPERTY.

GENERAL PUBLIC LAWS OF 1891, PAGES 165, 166. CHAPTER XCVIII.

A supplement to an act entitled "An act to revise and amend 'An act for the taxation of railroad and canal property,' approved April tenth, one thousand eight hundred and eighty-four," approved March twenty-seventh, one thousand eight hundred and eighty-eight.

1. *Be it enacted by the Senate and General Assembly of the State of New Jersey*, That section two of the act to which this is a supplement, be amended to read as follows:

2. *And be it enacted*, That all property of any railroad and of any canal company used for railroad or canal purposes shall be assessed by a state board of assessors, which shall consist of four members, and shall be appointed by the governor, by and with the advice and consent of the senate; no person shall be qualified or authorized to act as a member of said board unless his appointment shall have been confirmed by the senate; their term of office shall commence on the first Monday of May; the assessors first appointed shall be appointed to hold office respectively for one, two, three and four years, and until the appointment of a successor; all subsequent appointments shall be for a term of four years and until the appointment of a successor; vacancies shall be filled by the governor, subject to the approval of the senate; the said assessors shall be citizens of this state, and

195 shall not, during their term of office, be interested in any railroad or canal company; each assessor shall, before entering upon his duties, file with the secretary of state an oath taken before a justice of the supreme court that he will faithfully discharge the duties of his office, and that he is not interested in any railroad or canal company; they shall each receive an annual salary of twenty-five hundred dollars; three members shall constitute a quorum, and any official act shall be valid which has the sanction of three members; they may employ a secretary, who shall receive an annual compensation as the board of assessors may determine, not to exceed twenty-five hundred dollars; they shall keep a record of their proceedings and shall annually report to the legislature.

2. *And be it enacted*, That this act shall take effect immediately.

Approved March 17, 1891.

196 EXHIBIT "E" FOR IDENTIFICATION.

LAWS OF THE COMMONWEALTH OF PENNSYLVANIA, SESSION OF 1889.

(p. 420.) No. 332.

A further supplement to an act entitled "An act to provide revenue by taxation," approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine.

* * * * * * *

(p. 427.) SECTION 19. That hereafter no limited partnership, bank, joint-stock association, association, corporation or company whatsoever, formed, erected, incorporated or oganized by or under any law of this commonwealth, general or special, or formed, erected, incorporated or organized under the laws of any other state, and doing business in this commonwealth, shall go into operation, without first having the name of the institution or company, the date of incorporation or organization, the act of assembly or authority under which formed, incorporated or organized, the place of business, the post office address, the names of the president, chairman, secretary and treasurer or cashier, and the amount of capital authorized by its charter, and the amount of capital paid into the treasury, registered in the office of the auditor general; and every limited partnership, bank, association, joint-stock association, company or corporation whatsoever, now engaged in business in this comonwealth, shall within ninety days after the passage of this act, register as herein required in the office of the auditor general; all the corporations, companies, associations and imited partnerships
197 aforesaid, shall annually hereafter notify the auditor general of any change in their officers; and any such institution or company which shall neglect or refuse to comply with the provisions of this section, shall be subject to a penalty of five hundred dollars, which penalty shall be collected on an account settled by the auditor general and state treasurer in the same manner as taxes on capital stock are settled and collected.

SESSION OF 1891.

(p. 229.) No. 200.

An act to provide increased revenues for the purposes of relieving the burdens of local taxation, being supplementary to an act entitled "An act to provide revenue by taxation,' approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine, amending the first, fourteenth, sixteenth, twentieth, twenty-first, twenty-fifth and twenty-sixth sections of an act supplementary thereto, which became a law on the first day of June, Anno Domini one thousand eight hundred and eighty-nine, entitled "A further supplement to an act entitled 'An act to provide revenue by taxation,' approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine," and providing for greater uniformity of taxation by taxing all of the property of corporations, limited partnerships and joint-stock associations having a capital stock, at the rate of five mills on each dollar of its actual value.

* * * * * * *

(p. 233.) SECTION 4. That section twenty of said act which reads as follows, to-wit,

* * * * * * *

(p. 235.) be and the same is hereby amended so as to read as follows:

SECTION 20. That hereafter, except in the case of banks, savings institutions and foreign insurance companies, it shall be the duty of the president, chairman or treasurer of every corporation, having capital stock, every joint-stock association and limited partnership whatsoever, now or hereafter organized or incorporated by or under any law of this Commonwealth, and of every corporation, joint-stock association and limited partnership whatsoever, now or hereafter incorporated or organized by or under the laws of any other state of territory of the United States, or by the United States or by any foreign government, and doing business in and liable to taxation within this Commonwealth, or having capital or property employed or used in this Commonwealth by or in the name of any limited partnership, joint-stock association, company or corporation whatsoever, association or associations, co-partnership or co-partnerships, person or persons, or in any other manner, to make a report in writing to the Auditor General, in the month of November, one thousand eight hundred and ninety-two, and annually thereafter, stating specifically:

198

First. Total authorized capital stock.
Second. Total authorized number of shares.
Third. Number of shares of stock issued.
Fourth. Par value of each share.
Fifth. Amount paid into the treasury on each share.
Sixth. Amount of capital paid in.

Seventh. Amount of capital on which dividend was declared.

Eighth. Date of each dividend declared during said year ended with the first Monday of November.

Ninth. Rate per centum of each dividend declared.

199 Tenth. Amount of each dividend during the year ended with the first Monday in said month.

Eleventh. Gross earnings during the year.

Twelfth. Net earnings during said year.

Thirteenth. Amount of surplus.

Fourteenth. Amount of profit added to sinking fund during said year.

Fifteenth. Highest price of sales of stock between the first and fifteenth days of November aforesaid.

Sixteenth. Highest price of sales of stock during the year aforesaid.

Seventeenth. Average price of sales of stock during the year; and in every case any two of the following officers of such corporation, limited partnership or joint-stock association, namely: The president, chairman, secretary and treasurer, after being duly sworn or affirmed to do and perform the same with fidelity and according to the best of their knowledge and belief, shall, between the first and fifteenth days of November of each year, estimate and appraise the capital stock of the said company at its actual value in cash, not less, however, than the average price which said stock sold for during said year, and not less than the price or value indicated, or measured by net earnings or by the amount of profit made and either declared in dividends, or carried into surplus or sinking fund, and when the same shall have been so truly estimated and appraised they shall forthwith forward to the Auditor General a certificate thereof, accompanied with a copy of their said oath or affirmation, signed by them and attested by a magistrate or other person duly qualified to administer the same: Provided, That if the Auditor General and State Treasurer, or either of them, is not satisfied with the appraise-

200 ment and valuation so made and returned, they are hereby authorized and empowered to make a valuation thereof, based upon the facts contained in the report herein required, or upon any information within their possession, or that shall come into their possession, and to settle an account on the valuation so made by them for the taxes, penalties and interest due the Commonwealth thereon, with right to the company dissatisfied with any s-ttlement so made against it to appeal therefrom in the manner now provided by law; and in the event of the neglect or refusal of the officers of any corporation, company, joint-stock association or limited partnership, for a period of sixty days, to make the report and appraisement to the Auditor General as herein provided, it shall be the duty of the Auditor General and State Treasurer to estimate a valuation of the capital stock of such defaulting corporation, company, joint-stock association or limited partnership, and settle an account for taxes, penalty and interest thereon, from which settlement there shall be no right of appeal."

"EXHIBIT E" FOR IDENTIFICATION (Cont'd).

SESSION OF 1893.

(p. 353.) No. 288.

An act being a further supplement to an act entitled "An act to provide revenue by taxation," approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine, amending the amendment of the supplement thereto, which became a law on the first day of June, Anno Dominia one
201 thousand eight hundred and eighty-nine, which amendment herein amended was approved the eighth day of June, Anno Domini one thousand eight hundred and ninety-one, relating to the tax on capital stock.

SECTION 1. Be it enacted, &c., that the twenty-first section of an act which became a law on the first day of June, Anno Domini one thousand eight hundred and eighty-nine, entitled "A further supplement to an act entitled 'An act to provide revenue by taxation,' approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine, as the said section is amended by an act approved the eight- day of June, Anno Domini one thousand eight hundred and ninety-one," which reads as follows, to-wit:

* * * * * * *

be and the same is hereby amended so as to read as follows:

SECTION 21. That every corporation, joint-stock association, limited partnership and company whatsoever, from which a report is required under the twentieth section hereof, shall be subject to and pay into the treasury of the Commonwealth, annually, a tax at the rate of five mills upon each dollar of the actual value of its whole capital stock of all kinds, including common, special and preferred, as ascertained in the manner prescribed in the said twentieth section, and it shall be the duty of the treasurer or other officers having charge of any such corporation, joint-stock association or limited partnership, upon which a tax is imposed by this section, to transmit the amount of said tax to the treasury of the Commonwealth within thirty days from the date of settlement of the account by the Auditor General and State Treasurer; *Provided*, That for the pur-
poses of this act, interests in limited partnerships or joint-
202 stock associations shall be deemed to be capital stock and taxable accordingly; *Provided, also*, That corporations, limited partnerships and joint-stock associations, liable to tax on capital stock under this section, shall not be required to make and report or pay any further tax on the mortgages, bonds and other securities owned by them in their own right; but corporations, limited partnerships and joint-stock associations holding such securities as trustees, executors, administrators, guardians, or in any other manner, shall return and pay the tax imposed by this act upon all securities so held by them as in the case of individuals: *And provided further*,

That the provisions of this section shall not apply to the taxation of so much of the capital stock of corporations, limited partnerships or joint-stock associations, organized for manufacturing purposes, which is invested in and actually and exclusively employed in carrying on manufacturing within the State, except companies engaged in the brewing or distilling of spirits or malt liquors and such as enjoy and exercise the right of eminent domain; but every manufacturing corporation, limited partnership or joint-stock association shall pay the State tax of five mills herein provided, upon such proportion of its capital stock, if any, as may be invested in any property or business not strictly incident or appurtenant to its manufacturing business, in addition to the local taxes assessed upon its property in the districts where located, it being the object of this proviso to relieve from State taxation only so much of the capital stock as is invested purely in the manufacturing plant and business: *Provided further,* In case of fire or marine insurance companies the tax imposed by this section shall be at the rate of three mills on each dollar of the actual value of the whole capital stock.

Approved June 8, 1893.

203 "EXHIBIT E" FOR IDENTIFICATION (Cont'd).

SESSION OF 1889.

No. 332.

(p. 431.) 'SECTION 23. That every railroad company, pipe line company, conduit company, steamboat company, canal company, slack water navigation company, transportation company, street passenger railway company, and every other company, joint-stock association or limited partnership, now or hereafter incorporated or organized by or under any law of this Commonwealth, or now or hereafter organized or incorporated by any other State or by the United States or any foreign government, and doing business in this Commonwealth, and owning, operating or leasing to or from another corporation, company, association, joint stock association or limited partnership, any railroad, pipe line. slack water navigation, street passenger railway, canal or other device for the transportation of freight or passengers or oil, and every telephone or telegraph company incorporated under the laws of this or any other State or of the United States and doing business in this Commonwealth, and every express company, incorporated or unincorporated, doing business in this Commonwealth, and every firm, co-partnership or joint-stock company or association doing business in this Commonwealth, and every electric light company, and every palace car and sleeping car company, incorporated or unincorporated, doing business in this Commonwealth, shall pay to the state treasurer a tax of eight mills upon the dollar upon the gross receipts of said corporation, company or association, limited partnership, firm or co-partnership, received from passengers and freight traffic transported wholly within this

State, and from telegraph, telephone or express business
204 done wholly within this State, or from business of electric light companies, and from the transportation of oil done wholly within the State; the said tax shall be paid semi-annually upon the last days of January and July in each year; and for the purpose of ascertaining the amount of the same, it shall be the duty of the treasurer or other proper officer of the said company, firm, co-partnership, limited partnership, joint-stock association or corporation, to transmit to the auditor general a statement, under oath or affirmation, of the amount of gross receipts of the said companies, co-partnerships, corporations, joint-stock associations or limited partnerships derived from all sources, and of gross receipts from business done wholly within the State, during the preceding six months ending on the first days of January and July in each year; and if any such company, firm, co-partnership, joint-stock association, association or limited partnership or corporation, shall neglect or refuse for a period of thirty days ofter such tax becomes due, to make said returns or to pay the same, the amount thereof with an addition of ten per centum thereto, shall be collected for the use of the Commonwealth as other taxes are recoverable by law; *Provided*, That in any case where the works of one corporation, company, joint-stock association or limited partnership are leased to and operated by another corporation, company, association or limited partnership, the taxes imposed by this section shall be apportioned between the said corporations, companies, associations or limited partnerships, in accordance with the terms of their respective leases or agreements, but for the payment of the said taxes, the Commonwealth shall first look to the corporation, company, association or limited part-
205 nership operating the works, and upon payment by the said company, corporation, association or limited partnership of a tax upon the receipts as herein provided derived from the operation thereof, the corporation, company, joint-stock association or limited partnership from which the said works are leased, shall not be held liable under this section for any tax upon the proportion of said receipts received by it as rental from the use of said works.

SESSION OF 1889.

No. 332.

(p. 437.) SECTION 31. That all taxes imposed by this act shall be a lien upon the franchises and property, both real and personal, of corporations, companies, associations, joint-stock associations and limited partnerships, from the time the said taxes are due and payable; and whenever the franchises or property of a corporation, company, association, joint-stock association or limited partnership shall be sold at a judicial sale, all taxes due the Commonwealth shall first be allowed and paid out of the proceeds of such sale, before any judgment, mortgage or other claims which shall be entered of record or become a lien after the passage of this act.

206 "EXHIBIT F" FOR IDENTIFICATION.

PENNSYLVANIA COUNTY COURT REPORTS, VOLUME 14, PAGE 440.

COMMONWEALTH
vs.
DELAWARE, SUSQUEHANNA & SCHUYLKILL RAILROAD COMPANY.

Corporations—taxation of capital stock—minimum value—actual value—tangible property and assets—franchises and privileges—material results realized therefrom—section 4, revenue act of 1891, P. L., 229—preamble of act of 1891.

The intent and meaning of Sec. 4 of the revenue act of 1891 is that only so much of the income of a corporation—using this word as an equivalent for both net earnings and amount of profit made—as is "made and either declared in dividends or carried into surplus or sinking fund" is to be taken as the test of minimum value in appraising the capital stock of a corporation: Commonwealth *vs.* Sharon Coal Co., 14 Pa. C. C. R., 222.

The amount and rate per cent. of dividends made and the amount carried into surplus or sinking fund during the tax year do not furnish an absolute indication or measure of the actual value in cash of the capital stock, but are to be considered with all other relevant facts in determining what is its actual value in cash: Commonwealth *vs.* Sharon Coal Co., 14 Pa. C. C. R., 222; Commonwealth *vs.* Edgerton Coal Co., 14 Pa. C. C. R.

The tax on capital stock imposed by the taxing acts of Pennsylvania is not a franchise or license tax, but is a tax on the property and assets of a corporation: Commonwealth *vs.* Standard Oil Co., 101 Pa., 119.

207 The capital stock represents not only the property and assets of a corporation, but also the value of its franchises and privileges and facilities for doing business and the success with which the business is actually carried on, so far as these are donated and expressed by the pecuniary results realized; these elements of value are intended to be reached by the tax on capital stock by the express terms of the act of 1891.

Tax on capital stock.

C. P. Dauphin Co. March Term, 1893. No. 302.

Hensel, Attorney-General for the Commonwealth, and Lamberton, for the defendant.

SIMONTON, *P. J.:*

This is an appeal by the corporation defendant from the settlement of an account against it by the auditor general and state treasurer of tax on capital stock for the year ending first Monday of November, 1892, and it was tried by the court without a jury under the act of April 22, 1874.

Findings of Fact.

1. Defendant is and was during the year 1892 a corporation of and doing business in the State of Pennsylvania chartered in April, 1890, with an authorized capital stock of $1,000,000, of which $400,000 was paid in prior to June, 1892, and the balance at that time. Its railroad is located in the anthracite coal region of eastern Pennsylvania, and including branches is about 60 miles in length. It runs in a devious course, and thus and by means of branches from the main line reaches a number of collieries, nearly all of which are owned and controlled by the firm of Coxe Brothers & Co., who also own nearly all the shares of stock in the railroad company;
208 it was built for the purpose of connecting these collieries with the various railroads that traverse that region, and does not connect with the Pennsylvania, the Reading, the Lehigh Valley and the Jersey Central railroads; thus giving the owners of these collieries and of this railroad not merely access to the various markets for coal, east, north and west, but also a choice of roads over which to reach these markets and with which to make traffic contracts. Nearly all of the freight carried by the defendant is coal, and should this traffic fail or be withdrawn its capital stock would be comparatively valueless; but there is no evidence in the case tending to show that there is any present prospect that this will occur; and in view of the fact that these railroads and these collieries are owned by the same persons, it does not seem probable, so long as the coal mines are not exhausted; nor is there any evidence that this will take place for many years to come.

2. The gross earnings of the defendant during the year 1892 were $739,914.15 and its net earnings were $523,243.15, and it made one dividend during the year, on October 15th, 1892, of 40%, amounting to $400,000, out of net earnings realized to June 30, 1892; its net earnings from June 30, 1892, to February 28, 1893, were about $450,000, and the amount of its surplus on the first Monday in November, 1892, was $242,142.89, in addition to book accounts amounting to about $100,000 in excess of its current indebtedness; and there is no evidence in the case tending to show that its net earnings will be less in the future, except in so far as they may be affected by the general financial depression. The total cost of defendant's railroad, which was completed in February, 1893, including equipment, was $1,159,323.70.

3. Defendant's president and treasurer made to the auditor
209 general, under the sanction of the prescribed oath, the report and appraisement required by sec. 4 of the act of 1891 (P. L. 229), appraising defendant's capital stock of $2,000,000, which is double its par value. There were no sales of shares of the stock during the tax year.

4. The auditor general and the state treasurer were not satisfied with and did not accept this appraisement; but, as they understood to be their duty under the law, made an appraisement and fixed the value of said capital stock at $8,720,719.16. In making this ap-

praisement they had before them no other evidence of its actual value than that contained in the report made by the officers of the corporation as above stated; and this amount was adopted by them as the value of the capital stock because it was the sum which at six per cent. would produce $523,234.15, the amount of net earnings made by the defendant as shown by said report. On this valuation so made by the auditor general and state treasurer an account was settled against defendant for tax at the rate of 5 mills, amounting to $43,603.59, from which settlement defendant duly appealed to this court.

5. We find from the evidence that the actual value of the defendant's capital stock between the first and 15th days of November, 1892, was not $8,720,719.16, the amount at which it was appraised by the auditor general and state treasurer; but having in view from the evidence, considering all the facts which are in our judgment relevant on the principles more fully explained below, we find that the actual value in cash of the defendant's capital stock at the date mentioned was $4,000,000.

We have decided in opinions recently filed in Com. *v.* Sharon Coal Co., 23, June Term, 1893 (14 Pa. C. C. R., 222), in Com. *v.*
210 Edgerton Coal Co., 21, June Term, 1893, that the intent and meaning of sec. 4 of the revenue act of 1891, P. L. 229, is that only so much of the income of a corporation—using this word as an equivalent for both net earnings and amount of profit made—as is "made and either declared in dividends or carried into surplus or sinking fund" is to be taken as the test of minimum value in appraising the capital stock of a corporation; and that the amount and rate per cent. of the dividends made and the amount carried into surplus or sinking fund during the tax year do not furnish an absolute indication or measure of the actual value in cash of the capital stock, but are to be considered with all other relevant facts in determining what is its actual value in cash.

These decisions settle for us the law of this case on the points thus described and lead to the result that the appraisement made by the auditor general and state treasurer and the settlement based thereon cannot be sustained merely as a conclusion of law, but must stand or fall on the actual facts of the case; in other words, the question we have to decide on this appeal is what is the actual value in cash of the defendant's capital stock.

It has been settled by numerous decisions which are cited and affirmed in Com. *vs.* Standard Oil Co., 101 Pa., 119, that the tax on capital stock imposed by the taxing acts of this state is not a franchise or license tax, but is a tax on the property and assets of a corporation. But it by no means follows that the capital stock and the tangible property and assets are identical either in substance or in value. The capital stock, it is true, represents the property and assets of the corporation, but it represents also the value of its franchises and privileges and facilities for doing business and the success with
which the business is actually carried on, so far as these are
211 denoted and expressed by the pecuniary results realized; and the tax on capital stock is by the express terms of the act of

1891 intended to reach these elements of value. See preamble 6 P. L., 1891, p. 229.

The case of Com. *v.* Hamilton Manufacturing Co., 12 Allen, 298, contains an admirable discussion and exposition by Bigelow, *C. J.*, of the difference which may exist between the value of the tangible property and the assets of a corporation and the value of its capital stock, which is so apt for our purpose that we make copious extracts therefrom, with the remark that the whole opinion ought to be read in its connection. Assuming that the value of the capital stock of a corporation is equal to the value of all its shares—the theory of the act of 1891, which makes the market price of the shares a test of the actual value of the capital stock—he says: "The aggregate market value of all shares, by which we understand the cash price for which the shares will sell in the market, does not necessarily indicate the actual value or amount of property which a corporation may own. The price for which all the shares would sell may greatly exceed the aggregate of the corporate property or it may fall very short of it. Undoubtedly the amount of property belonging to a corporation is one of the considerations which enters into the market value of its shares; but such market value also embraces other essential elements. It is not made up solely by the valuation or estimate which may be put on the corporate property, but it also includes the profits and gains which have attended its operations, the prospects of its future success, the nature and extent of its corporate rights and privileges and the skill and ability with which its business is managed. In other words, it is the estimate put on the potentiality of a cor-
212 poration, on the capacity to avail itself profitably of its franchise, and on the modes in which it uses its privileges as a corporate body, which materially influences and often controls the market value." "There may be two corporations organized with similar powers, having the same number of shares, the same amount of property, of capital, and both may be engaged in the same branch of business; the market value of the shares in one corporation may be double that of the other, because one is prosperous and likely to make large gains, while the other is unsuccessful and is carrying on a business which may prove unprofitable or lead to heavy loss. The tax is therefore laid not on capital stock as signifying the money paid in to carry on the business of the corporation or the property purchased and owned by the corporation, but on the capital stock representing the aggregate of the market value of the shares. The price for which these shares may be sold does not depend upon the value or amount of property belonging to a corporation, but rather on the capacity of a corporation to use its property in connection with its corporate powers and privileges advantageously and profitably and upon the present prosperity, prospective earnings and profitable final results of the corporate business." "Nor are we able to see any reason why the aggregate market value of all the shares of a corporation, representing as it does the estimate put not merely on the property of a corporation but also on the rights, privileges, capacities and present and prospective results of the corporate organization and business—in other words, on its franchise—is not a legitimate

and just method of arriving at a basis on which to calculate an excise or tax."

These extracts, and still more the whole opinion from which they are taken, abundantly show that the actual value in cash of
213 defendant's capital stock is not to be determined solely by ascertaining the value of its tangible property and assets, but that many other elements of value are to be considered. Chief Justice Bigelow's discussion, it is true, leads him to the conclusion that the tax he is considering is a franchise tax, and not a tax on tangible property; but this view of the case was considered in the Supreme Court of the United States in Hamilton Co. *v.* Massachusetts, 6 Wall. 632, was accepted only because it was thought to be required by the peculiar provision of the constitution of the state of Massachusetts, and the construction which had long been put upon it by the Supreme Court of that State, which as a question of the construction of a state statute was binding on the federal court. Thus Mr. Justice Clifford, delivering the opinion and referring to the decision that the tax in question was franchise tax, at page 639 said: "Separate from the peculiar provision of the state constitution and the long practice under the original decision" (in Portland Bank *v.* Apthorp, 12 Mass. 252) "the present decision of the state court upon the subject might well be criticised as founded in unsubstantial distinctions, but when weighed as an exposition of that peculiar clause" (of the state constitution) "and in view of the long practice of the state, commencing long before the prior decision was made, it is not possible to withhold from the conclusion a full and unqualified concurrence * * * fifty years have elapsed since that decision was made and the practice in substance and effect is still continued, having been repeatedly sanctioned by the unanimous decisions of the highest judicial authority of the state."

The Chief Justice and Justices Greer and Miller refused to be bound by the construction put upon the statute by the state court and dissented on the ground that the tax in question was a
214 tax on the property of the corporation and not a franchise tax.

On the subject of taxing corporate franchises as property Justice Clifford said: "Corporate franchises * * * are legal estates and not mere naked powers granted to the corporations, but powers coupled with an interest which rest in the corporation by virtue of their charter, and * * * the privileges and franchises of a private corporation unless exempt in terms which amount to a contract, are as much the legitimate subjects of taxation as any other property of the citizens within the sovereign power of the state."

And in Wilmington Railroad *v.* Reid, 13 Wall. 264, Mr. Justice Davis, delivering the opinion of the court, said: "It is insisted, however, that the tax on the franchise is something entirely distinct from the property of the corporation, and that the legislature was not therefore inhibited from taxing it. Nothing is better settled than that the franchise of a private corporation * * * which in its application to a railroad is the privilege of running it and taking fares and freight * * * is property, and of the most valuable kind, as

it cannot be taken for public use even without compensation. It is true it is not the same sort of property as the rolling stock, roadbed and depot grounds, but it is equally with them covered by the general term 'the property of the company.'"

There is therefore no legal principle in the way of holding that the tax on capital stock in this state is a tax on property and at the same time including in the appraisement the value of the franchises and privileges enjoyed and exercised by the corporation, and determining the value of these by the material result of their exercise.

Acting on the principle suggested by the foregoing dis-
215 cussion the members of this court, both of whom sat at the trial, concur in the findings of fact above set forth, and in the conclusion that the defendant's capital stock was between the first and fifteenth days of November, 1892, of the actual value in cash of $4,000,000; and the commonwealth is therefore entitled to judgment as follows:

Value of the capital stock.....		$4,000,000 00
Tax, 5 mills.....	$20,000 00	
Interest from April 1, 1893, to January 1, 1894, at 12% per annum.....	1,800 00	
Attorney-General's commission, 5%....	1,000 00	
Total	$22,800 00	

for which amount judgment is directed to be entered in favor of the commonwealth and against the defendant, if exceptions be not filed within the time limited by law.

107 PENNSYLVANIA STATE, 156.

PULLMAN'S PALACE CAR CO. *v.* COMMONWEALTH, No. 2.

1. Under the acts of assembly of Pennsylvania imposing state tax on capital stock of corporations doing business in this state, Pullman's Palace Car Company, a foreign corporation, is liable to taxation on the proportion of its capital stock invested in Pennsylvania as represented by the cars used by it in the state, whether such cars be owned or leased by said company. The fact that said cars are continuously run into, through and out of this state and are also operated in other states does not exempt the company from taxation here; it but reduces the valuation upon which the company is taxable.

216 2. Such construction of said acts of assembly does not render the same obnoxious to the provision of the federal constitution regulating interstate commerce.

June 6, 1884. Before Mercur, *C. J.*, and Gordon, Paxson, Turnkey, Sterrett, Green and Clark, *JJ.*

Error to the Court of Common Pleas of Dauphin County of May term, 1883. No. 35.

This case was in the court below and appealed by Pullman's Palace Car Company from a settlement of account by the auditor general and state treasurer charging the said corporation with a tax on its capital stock for the years 1870 to 1880 inclusive, under the provisions of the acts of May 1, 1868, April 24, 1874, section 4, March 20, 1877, and June 7, 1879. The account was based upon the estimated rate of dividends in each year and upon the estimated proportion of capital stock taxable for Pennsylvania, and included interest and penalties for failure to report.

The defendant filed specifications of objection and the case was tried by agreement under the act of April 22, 1874, without a jury, before Simonton, *P. J.*, whose findings of fact and conclusions of law were as follows:

The defendant is a corporation of the state of Illinois, having its principal office in Chicago. Its business was during all the time for which tax is charged, to furnish sleeping coaches and parlor and dining-room cars to various railroad companies with which it contracted, on the following terms: That defendant furnished the coaches and cars, and the railroad companies attached and made them part of their trains, no charge being made by either party against the other. The railroad companies collected the usual fare from passengers who travelled in their coaches and cars, and
217 the defendant collected a separate charge for the use of the seats, sleeping berths and other conveniences. Business has been carried on continuously by the defendant in this way in Pennsylvania since February 17, 1870, and it has had about 100 coaches and cars engaged in this way in this state during that time.

About the time defendant began operations in this state, a corporation thereof called the Central Transportation Company was engaged in a like business here and had contracted with many of the railroad companies in the state to run parlor and sleeping cars on the terms stated above.

Defendant found it for its interest to purchase said contracts from said company and lease its cars for a period of 99 years, at an annual rental, covenanting to keep the cars in repair and return them or others in their place in as good order as when received at the end of that period. These cars, or most of them, as well as some of the other cars belonging to the defendant, have ever since been running in, into, through and out of the state.

The following additional facts were found by the Court:

1. That defendant transacted no business in Pennsylvania except upon the roads and in the cars covered by its lease with the Central Transportation Company.

2. That defendant leased 119 cars from the Central Transportation Company, and that said cars were more than sufficient for the transportation of all the business done by it within the State of Pennsylvania, no more than 100 cars being used in said State in any year.

3. That the cars used in the state of Pennsylvania were
218 also used in other states; their use in Pennsylvania being confined to passengers to or from points in other states.

4. That the rental paid to the Central Transportation Company for the use of its cars exceeded the gross receipts of the defendant from all its business within the state of Pennsylvania.

5. That the Central Transportation Company is a corporation of the state of Pennsylvania, and has paid to the state the full tax upon its entire capital stock for each of the years embraced in this suit.

On the facts defendant claims that no part of its capital stock is invested in this state. The argument is that its cars are personal property, and as they are not permanently located in this state, but pass into, through and out of it, this personal property has no taxable *situs* in Pennsylvania, and cannot be taxed specifically in any given locality, and therefore it is contended as the tax on capital stock is a tax on the property in which that capital is invested, the latter cannot be taxed.

It has certainly been settled by Commonwealth *v.* Standard Oil Company, 5 Out. 119, that "a tax upon the capital stock of the company is a tax upon its property and assets."

But it has never yet, so far as we know, been decided that the capital stock of a company and its property and assets are identical, or that any given part of the former represents any specific articles of the latter. It would be carrying the principle to a dangerous extreme to so decide. We hold, therefore, that the proportion of the capital stock of the defendant invested and used in Pennsylvania is taxable under these acts, and that the amount of the tax may be properly ascertained by taking as a basis the proportion which the number of miles operated by defendant in this state bears
219 to the whole number of miles operated by it, without regard to the question where any particular car or cars were used. Nor it is in our opinion of any consequence that some of the cars were leased for 99 years from another company on the conditions stated in the findings of fact above.

We need not even stop to determine the precise nature of the property which defendant has in them. Whatever it be, it is an asset of the company and is therefore represented by and helps to give value to its capital stock. It cannot change the case that the lessor company pays tax on its capital stock; that represents its interest, if any, in these cars. The questions involved need no further elaboration; we therefore briefly state the conclusions of law which we think are involved in the case:

1. The defendant is liable to tax on the proportion of its capital stock invested in this state as represented by coaches and cars owned and used by it here.

2. The fact that some of said coaches and cars have been leased from the Central Transportation Company for 99 years does not affect such liability.

3. The laws under which said taxes are imposed and said liability accrues are not in conflict with section 8 of article 1 of the Constitution of the United States.

4. Said company is not chargeable with penalty for failure to report, and with interest only from 60 days after the date of the settlement.

Determining the amount of the tax on the principles above stated it is as follows:

220	Tax for the years 1870 to 1880, inclusive.....	$16,321.89
	Interest from May 1, 1881, to May 10, 1883....	3,971.65
	Attorney-General's commission.....	816.09
	Total	$21,109.63

for which amount let judgment be entered unless exception be filed according to law.

The defendant excepted to the foregoing conclusions of law (other than the 4th) and filed the following additional exceptions:

9. The court erred in not finding as a conclusion of law that Pullman's Palace Car Company is not liable for taxation upon its own capital stock by reason of the cars leased from the Central Transportation Company.

10. The court erred in not finding as a conclusion of law that defendant being a corporation of the state of Illinois, is not taxable upon any proportion of its capital stock by reason of its permitting its cars to be transported into, out of or through this state, so long as they do not obtain a *situs* here.

11. The court erred in directing judgment to be entered in favor of the Commonwealth for $21,109.63.

12. The court erred in not ordering judgment to be entered in favor of defendant.

The court overruled the above exceptions and judgment was duly entered for the Commonwealth in accordance with the above decision. The defendant tok this writ of error, assigning for error the dismissing of said exceptions, and the judgment.

M. E. Olmsted and O. A. Lochrane for plaintiff in error.

221 The claim in this case is controlled by the decision in Com'th *v.* Standard Oil Co., 5 Out. 119, that a tax upon capital stock is a tax upon property aad assets within the state. But the Pullman Car Company had no capital invested in Pennsylvania aside from the inference sought to be drawn from its contract with the Central Transportation Company, a Pennsylvania corporation. For the convenience of the travelling public by avoiding repeated changes of cars upon connecting lines and over long routes of railroad, and to avoid inconvenience incident to the maintenance of this business under two different managements, it was found expedient in 1870 to enter into an agreement whereby Pullman's Palace Car Company became the lessee of the 119 cars of the Central Transportation Company, and undertook to perform the contracts of the latter company with the various railroads in Pennsylvania and elsewhere. By that contract the ownership of the cars remained in the Central Transportation Company, and that company has paid tax to the state on its entire capital stock, *i. e.*, on its entire property, which includes tax on these cars. To tax these cars again in the name of the Pullman Company is double taxation, not contemplated by the act of assembly. The Court found as a fact that no portion of the

dividends of the Pullman Company accrued from the operation of these cars in Pennsylvania, for the rental paid to the Central Transportation Company exceeded the gross receipts derived from the use of these cars in Pennsylvania.

But even if the Pullman Company owned the cars it would not be subject to taxation in respect thereof in Pennsylvania; The Pullman Company is a foreign corporation, and its cars are only temporarily in Pennsylvania while in transit to or from points in other
222 states; the cars have no *situs* here, and while being transported into, through and out of the state are protected from taxation by the commercial clause of the Federal Constitution.

State tax on foreign held bonds, 15 Wall. 319; Morgan *v.* Parham, 16 Wall. 471; St. Louis *v.* Ferry Co., 11 Wall. 423; Delaware Railroad Tax Case, 18 Wall. 229; Hays *v.* Pacific Mail S. S. Co., 17 How. 596; Com'th *v.* Standard Oil Co., 5 Out. 119; Appeal Tax Court of Baltimore Co. *v.* Pullman's Palace Car Co., 5 Md. 452.

Lewis C. Cassidy, Attorney General, and Robert Snodgrass, Deputy Attorney-General for the Commonwealth.

The opinion of the Court was delivered October 6, 1884. *Per Curiam:* We think it very clear that the plaintiff in error is engaged in carrying on such a business within this commonwealth as to subject it to the statutes imposing taxation. While a tax on the capital stock of a company is a tax on its property and assets, yet the capital stock of the company and its property and assets are not identical. The coaches of the company are its property. They are operated within this state. They are daily passing from one end of the state to the other. They are used in performing the functions for which the corporation was created. The fact that they are also operated in other states cannot wholly exempt them from taxation here. It reduces the value of the property in this state justly subject to taxation here. This was recognized in the Court below and we think the proportion was fixed according to a just and equitable rule.

Judgment affirmed.

223 EXHIBIT F FOR IDENTIFICATION (Cont'd).

141 UNITED STATES REPORTS, PP. 18–36.

PULLMAN'S PALACE CAR COMPANY
v.
PENNSYLVANIA.

Error to the Supreme Court of the State of Pennsylvania.

No. 1. Argued October 18, 1888.—Re-argument ordered November 5, 1888.—Re-argued March 6, 1890.—Decided May 25, 1891. A statute of a State, imposing a tax on the capital stock of all corporations engaged in the transportation of freight or passengers within the State, under which a corporation of another State, engaged in running railroad cars into, through and out of the State, and having

at all times a large unmber of such cars within the State, is taxed by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the State bears to the whole number of miles in this and other States over which its cars are run, does not, as applied to such a corporation, violate the clause of the Constitution of the United States granting to Congress the power to regulate commerce among the several States.

This was an action brought by the State of Pennsylvania against Pullman's Palace Car Company, a corporation of Illinois, in the Court of Common Pleas of the county of Dauphin, in the State of Pennsylvania, to recover the amount of a tax settled by the auditor general and approved by the treasurer of that State, for the years 1870 to 1880 inclusive, on the defendant's capital stock, taking as the basis of assessment such proportion of its capital stock as
224 the number of miles of railroad over which cars were run by the defendant in Pennsylvania bore to the whole number of miles in this and other States over which its cars were run.

All these taxes are levied under successive statutes of Pennsylvania, imposing taxes on capital stock of corporations, incorporated by the laws of Pennsylvania or of any other State, and doing business in Pennsylvania, computed on a certain percentage of dividends made or declared. The taxes for 1870-1874 were levied under the statute of May 1, 1868, c. 69, sec. 5, which applied to corporations of every kind, with certain exceptions not material to this case, and fixed the amount of the tax at half a mill on every one per cent. of dividend. Penn. Laws, 1868, p. 109. The taxes for 1875–1877 were levied under the statute of April 24, 1874, c. 31, sec. 4, which applied to all corporations in any way engaged in the transportation of freight or passengers, and fixed the tax at nine-tenths of a mill on every one per cent. of dividend, Penn. Laws, 1874, p. 70. The taxes for 1878–1880 were levied under the statutes of March 20, 1877, c. 5, sec. 3, and of June 7, 1879, c. 122, sec. 4, applicable to all corporations, except building associations, banks, savings institutions and foreign insurance companies, and fixing the tax at half a mill on each one per cent. of dividends of six per cent. or more on the par value of the capital stock, and, when the dividend was less, at three mills on a valuation of the capital stock. Penn. Laws, 1877, p. 8; 1879, p. 114.

A trial by jury was waived, and the case submitted to the decision of the Court, which found the following facts: "The defendant is a corporation of the State of Illinois, having its principal office in Chicago. Its business was, during all the time for which tax
225 is charged, to furnish sleeping coaches and parlor and dining-room cars to the various railroad companies with which it contracted on the following terms: The defendant furnished the coaches and cars, and the railroad companies attached and made them part of their trains, no charge being made by either party against the other. The railroad companies collected the usual fare from passengers who travelled in their coaches and cars, and the defendant collected a separate charge for the use of the seats, sleeping

berths and other conveniences. Business has been carried on continuously by the defendant in this way in Pennsylvania since February 17, 1870, and it has had about one hundred coaches and cars engaged in this way in the State during that time. The cars used in this State have, during all the time for which tax is charged, been running into, through and out of this State."

Upon these facts the Court held "that the proportion of the capital stock of the defendant invested and used in Pennsylvania is taxable under these acts; and that the amount of the tax may be properly ascertained by taking as a basis the proportion which the number of miles operated by the defendant in this State bears to the whole number of miles operated by it, without regard to the question where any particular car or cars were used," and therefore gave judgment for the State.

That judgment was affirmed, upon writ of error, by the Supreme Court of the State, for reasons stated in its opinoin as follows: "We think it very clear that the plaintiff in error is engaged in carrying on such a business within this Commonwealth, as to subject it to the statutes imposing taxation. While the tax on the capital stock of a company is a tax on its property and assets, yet the capital stock of a company and its property and assets are not iden-
226 tical. The coaches of the company are its property. They are operated within this State. They are daily passing from one end of the State to the other. They are used in performing the functions for which the corporation was created. The fact that they are also operated in other States cannot wholly exempt them from taxation here. It reduces the value of the property in this State, justly subject to taxation here. This was recognized in the court below, and we think the proportion was fixed according to a just and equitable rule." 107 Penn. St. 156, 160.

Pullman's Palace Car Company sued out a writ of error from this court, and filed six assignments of error, the substance of which was summed up in the brief of its counsel as follows: "The court erred in holding that any part of the capital stock of the Pullamn Company was subject to taxation by the State of Pennsylvania by reason of its running any of its cars into, out of, or through the State of Pennsylvania in the course of their employment in the interstate transportation of railway passengers."

Mr. Edward S. Isham and Mr. William Barry argued for the plaintiff in error at the argument on the 18th of October, 1888.

Mr. Edward S. Isham and Mr. John S. Runnells argued for the plaintiff in error at the argument on the 6th of March, 1890.

Mr. W. S. Kirkpatrick, Attorney General of the State of Pennsylvania, argued for the defendant in error at both arguments. Mr. John F. Sanderson, Deputy Attorney General of that State, was with him on the brief in both cases.

Mr. Justice Gray, after stating the case as above, delivered the opinion of the Court.

Upon this writ of error, whether this tax was in accordance
227 with the law of Pennsylvania is a question on which the decision of the highest Court of the State is conclusive. The

only question of which this Court has jurisdiction is whether the tax was in violation of the clause of the Constitution of the United States granting to Congress the power to regulate commerce among the several States. The plaintiff in error contends that its cars could be taxed only in the State of Illinois, in which it was incorporated and had its principal place of business.

No general principles of law are better settled, or more fundamental, than that the legislative power of every State extends to all property within its borders, and that only so far as the comity of that State allows can such property be affected by the law of any other State. The old rule, expressed in the maxim *mobilia sequuntur personam*, by which personal property was regarded as subject to the law of the owner's domicil, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*, the law of the place where the property is kept and used. Green *v.* Van Buskirk, 5 Wall. 307, and 7 Wall. 139; Hervey *v.* Rhode Island Locomotive Works, 93 U. S., 664; Harkness *v.* Russell, 118 U. S. 663, 679; Walworth *v.* Harris, 129 U. S. 355; Story on Conflict of Laws, sec. 550; Wharton on Conflict of Laws, secs. 297–311. As observed by Mr. Justice Story, in his commentaries just cited, "although movables are for many purposes to be deemed to have no *situs*, except that of the domicil of the owner, yet this being but a legal fiction, it
228 yields whenever it is necessary for the purpose of justice that the actual *situs* of the thing should be examined. A nation within whose territory any personal property is actually situate has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there."

For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner; and he may be taxed, on its account, at the place where it is, although not the place of his own domicil, and even if he is not a citizen or a resident of the State which imposes the tax. Lane County *v.* Oregon, 7 Wall. 71, 77; Railroad Co. *v.* Pennsylvania, 15 Wall. 300, 323, 324, 328; Railroad *v.* Peniston, 18 Wall. 5, 29; Tappan *v.* Merchants' Bank, 19 Wall. 490, 499; State Railroad Tax Cases, 92 U. S., 575, 607, 608; Brown *v.* Houston, 114 U. S. 622; Coe *v.* Errol, 116 U. S. 517, 524; Marye *v.* Baltimore & Ohio Railroad, 127 U. S. 117, 123.

It is equally well settled that there is nothing in the Constitution or laws of the United States which prevents a State from taxing personal property employed in interstate or foreign commerce like other personal property within its jurisdiction. Delaware Railroad Tax, 18 Wall. 206, 232; Telegraph Co. *v.* Texas, 105 U. S. 460, 464; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 206, 211; Western Union Telegraph Co. *v.* Attorney General of Massachu-

setts, 125 U. S. 530, 549; Marye *v.* Baltimore & Ohio Railroad, 127 U. S. 117, 124; Leloup *v.* Mobile, 127 U. S. 640, 649.

Ships or vessels, indeed, engaged in interstate or foreign commerce upon the high seas, or other waters which are a common high-
229 way, and having their home port, at which they are registered under the laws of the United States, at the domicil of their owners in one State, are not subject to taxation in another State at whose ports they incidentally and temporarily touch for the purpose of delivering or receiving passengers or freight. But that is because they are not, in any proper sense, abiding within its limits, and have no continuous presence or actual *situs* within its jurisdiction, and, therefore, can be taxed only at their legal *situs*, their home port and the domicil of their owners. Hays *v.* Pacific Mail Steamship Co., 17 How. 596; St. Louis *v.* Ferry Co., 11 Wall. 423; Morgan *v.* Parham, 16 Wall. 471; Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196.

Between ships and vessels having their *situs* fixed by act of Congress, and their course over navigable waters, and touching land only incidentally and temporarily; and cars, or vehicles of any kind, having no *situs* so fixed, and traversing the land only, the distinction is obvious. As has been said by this court: "Commerce on land between the different States is so strikingly dissimilar, in many respects, from commerce on water that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the State and the Federal governments. No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade
230 and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature. So that State interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land." Railroad Co. *v.* Maryland, 21 Wall. 456, 470.

In Gloucester Ferry Co. *v.* Pennsylvania, on which the plaintiff in error much relies, the New Jersey corporation taxed by the State of Pennsylvania, under one of the statutes now in question, had no property in Pennsylvania except a lease of a wharf at which its steamboats touched to land and receive passengers and freight carried across the Delaware River; and the difference in the facts of that case and of this, and in the rules applicable, was clearly indicated in the opinion of the court as follows: "It is true that the property of corporations engaged in foreign or interstate commerce, as well as the property of corporations engaged in other business, is subject to taxation, provided always it be within the jurisdiction of

the State." 114 U. S. 206. "While it is conceded that the property in a State belonging to a foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void, as an interference with, and an obstruction of, the power of Congress in the regulation of such commerce. 114 U. S. 211.

231 Much reliance is also placed by the plaintiff in error upon the cases in which this court has decided that citizens or corporations of one State cannot be taxed by another State for a license or privilege to carry on interstate or foreign commerce within its limits. But in each of those cases the tax was not upon the property employed in the business, but upon the right to carry on the business at all, and was therefore held to impose a direct burden upon the commerce itself. Moran *v.* New Orleans, 112 U. S. 69, 74; Pickard *v.* Pullman's Southern Car Co., 117 U. S. 34, 43; Robbins *v.* Shelby Taxing District, 120 U. S. 489, 497; Leloup *v.* Mobile, 127 U. S., 640, 644. For the same reason, a tax upon the gross receipts derived from the transportation of passengers and goods between one State and other States or foreign nations has been held to be invalid. Fargo *v.* Michigan, 121 U. S. 230; Philadelphia & Southern Steamship Co. *v.* Pennsylvania, 122 U. S. 326.

The tax now in question is not a license tax or a privilege tax; it is not a tax on a business or occupation; it is not a tax on, or because of, the transportation, or the right — transit, of persons or property through the State to other States or countries. The tax is imposed equally on corporations doing business within the State, whether domestic or foreign, and whether engaged in interstate commerce or not. The tax an the capital of the corporation on account of its property within the State, is, in substance and effect, a tax on that property. Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S., 196, 209; Western Union Telegraph Co. *v.* Attorney General of Massachusetts, 125 U. S. 530, 552. This is not only admitted, but insisted on by the plaintiff in error.

The cars of this company within the State of Pennsylvania are employed in interstate commerce, but their being so em-

232 ployed does not exempt them from taxation by the State; and the State has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and fro upon certain routes of travel. If they had never passed beyond the limits of Pennsylvania, it could not be doubted that the State could tax them, like other property within its borders, notwithstanding they were employed in interstate commerce. The fact that, instead of stopping at the State boundary, they cross that boundary in going out and coming back, cannot affect the power of the State to levy a tax upon them. The State, having the right, for the purposes of taxation, to tax any personal property

found within its jurisdiction, without regard to the place of the owner's domicil, could tax the specific cars which at a given moment were within its borders. The route over which the cars travel extending beyond the limits of the State, particular cars may not remain within the State; but the company has at all times substantially the same number of cars within the State, and continuously and constantly uses there a portion of its property; and it is distinctly found, as a matter of fact, that the company continuously throughout the periods for which these taxes were levied, carried on business in Pennsylvania, and had about one hundred cars within the State.

The mode which the State of Pennsylvania adopted to ascertain the proportion of the company's property upon which it should be taxed in that State, was by taking as a basis of assessment such portion of the capital stock of the company as the number of miles over which it ran cars within the State bore to the whole number of miles, in that and other States, over which its cars were run.

This was a just and equitable method of assessment; and,
233 if it were adopted by all of the States through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more.

The validity of this mode of apportioning such a tax is sustained by several decisions of this court, in cases which came up from the Circuit Courts of the United States, and in which, therefore, the jurisdiction of this court extended to the determination of the whole case, and was not limited, as upon writs of error, to the state courts, to questions under the Constitution and laws of the United States.

In the State Railroad Tax Cases, 92 U. S. 575, it was adjudged that a statute of Illinois, by which a tax on the entire taxable property of a railroad corporation, including its rolling stock, capital and franchise, was assessed by the state board of equalization, and was collected in each municipality in proportion to the length of the road within it, was lawful, and not in conflict with the Constitution of the State; and Mr. Justice Miller delivering judgment said:

"Another objection to the system of taxation by the State is, that the rolling stock, capital stock and franchise are personal property, and that this, with all other personal property, has a local *situs* at the principal place of business of the corporation, and can be taxed by no other county, city or town, but the one where it is so situated. This objection is based upon the general rule of law that personal property, as to its *situs*, follows the domicil of its owner. It may be doubted very reasonably whether such a rule can be applied to a railroad corporation as between the different localities embraced by its line of road. But, after all, the rule is merely the law of the State which recognizes it; and when it is called into operation
234 as to property located in one State, and owned by a resident of another, it is a rule of comity in the former State rather than an absolute principle in all cases. Green *v.* Van Buskirk, 5 Wall. 312; like all other laws of a State, it is therefore subject to legislative appeal, modification or limitation; and when the legislature of Illinois declared that it should not prevail in assessing

personal property of railroad companies for taxation, it simply exercised an ordinary function of legislation." 92 U. S. 607, 608.

"It is further objected that the railroad track, capital stock and franchise is not assessed in each county where it lies, according to its value there, but according to an aggregate value of the whole, on which each county, city and town collects taxes according to the length of the track within its limits." It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised, than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole." "This court has expressly held in two cases, where the road of a corporation ran through different States, that a tax upon the income or franchise of the road was properly apportioned by taking the whole income or value of the franchise, and the length of the road within each State, as the basis of taxation. Delaware Railroad Tax, 18 Wall. 206; Erie Railroad *v.* Pennsylvania, 21 Wall. 492." 92 U. S. 608, 611.

So in Western Union Telegraph Co. *v.* Attorney General of Massachusetts, 125 U. S. 530, this court upheld the validity of a tax imposed by the State of Massachusetts upon the capital stock of a telegraph company, on account of property owned and used by it within the state, taking as the basis of assessment such proportion of the value of its capital stock as the length of its lines within the State bore to their entire length throughout the country.

235 Even more in point is the case of Mayre *v.* Baltimore & Ohio Railroad, 127 U. S. 117, in which the question was whether a railroad company incorporated by the State of Maryland, and no part of whose own railroad was within the State of Virginia, was taxable under general laws of Virginia upon rolling stock owned by the company, and employed upon connecting railroads leased by it in that State, yet not assigned permanently to those roads, but used interchangeably upon them and upon roads in other States, as the company's necessities required. It was held not to be so taxable, solely because the tax laws of Virginia appeared upon their face to be limited to railroad corporations of that State; and Mr. Justice Matthews, delivering the unanimous judgment of the court, said:

"It is not denied, as it cannot be, that the State of Virginia has rightful power to levy and collect a tax upon such property used and found within its territorial limits, as this property was used and found, if and whenever it may choose, by apt legislation, to exert its authority over the subject. It is quite true, as the *situs* of the Baltimore and Ohio Railroad Company is in the State of Maryland, that also, upon general principles, is the *situs* of all its personal property; but for purposes of taxation, as well as for other purposes, that *situs* may be fixed in whatever locality the property may be brought and used by its owner by the law of the place where it is found. If the Baltimore and Ohio Railroad Company is permitted by the State of Virginia to bring into its territory, and there habitually to use and employ a portion of its movable personal property, and the railroad company chooses so to do, it would cer-

tainly be competent and legitimate for the State to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in the like
236 way by its own citizens. And such a tax might be properly assessed and collected in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases the tax might be fixed by an appraisement and valuation of the average amount of the property thus habitually used, and collected by distraint upon any portion that might at any time be found. Of course, the lawlessness of a tax upon vehicles of transportation used by common carriers might have to be considered in particular instances with reference to its operation as a regulation of commerce among the States; but the mere fact that they were employed as vehicles of transportation in the interchange of interstate commerce would not render their taxation invalid." (127 U. S. 123, 124.)

For these reasons, and upon these authorities, the court is of opinion that the tax in question is constitutional and valid. The result of holding otherwise would be that, if all the States should concur in abandoning the legal fiction that personal property has its *situs* at the owner's domicil, and in adopting the system of taxing it at the place at which it is used and by whose laws it is protected, property employed in any business requiring continuous and constant movement from one State to another would escape taxation altogether.

Judgment affirmed.

Mr. Justice Bradley, with whom concurred Mr. Justice Field and Mr. Justice Harlan, dissenting.

(Dissenting opinion omitted.)

Mr. Justice Brown, not havng been a member of the court when this case was argued, took no part in its decision.

237 "EXHIBIT F" FOR IDENTIFICATION.

145 PENNSYLVANIA STATE, 96.

THE COMMONWEALTH
vs.
D., L. & W. R. R. Co.

Appeal by the Commonwealth from the Court of Common Pleas of Dauphin County.

Argued June 3, 1891; Decided June 12, 1891.

1. The capital stock of a domestic railroad corporation represented by its equipment in use interchangeably on its lines within and without the state is taxable under section four act of June 7, 1879, P. L. 114, and section 21 act of June 1, 1889, P. L. 429, in the proportion *of* its mileage operated in this state bears to its entire

mileage. Pullman's Palace Car Co. *vs.* Commonwealth, 107, Pa. 156.

2. But the capital of such company invested in real estate and other railroads outside of the state, and in vessels, barges and tugs built, registered and used wholly outside the state is not subject to such taxation; the said property being already chargeable in the states where it exists and is used; Commonwealth *v.* Dredging Co., 122 Pa., 386, distinguished.

Before Paxson, *C. J.*, Sterrett, Green, Clark, Williams, McCollom and Mitchell, *JJ.*

No. 49, May Term, 1891, Sup. Ct. Court below No. 248, January Term, 1891, C. P.

On November 11, 1890, under an account stated by the auditor general and state treasurer against the Delaware, Lackawanna & Western Railroad Co. for tax on capital stock under section 4, act of June 7, 1879, P. L. 114, and section 21, act of June 1, 1889, P. L. 429, for the year ending the first Monday of November, 1889, the company filed an appeal and specifications of objections.

On May 9, 1890, the cause having been heard on sub-
238 mission to the court without a jury, under the act of April 22, 1874, P. L. 109, the court, Simonton, *P. J.*, filed the following decision:

Findings of Fact.

1. This is an appeal from a settlement made by the auditor general and state treasurer on the 10th day of September, 1890, against the defendant for tax on capital stock for the year ending the first Monday of November, 1889, based upon a report made by defendant's secretary and treasurer as required by law. In said settlement defendant is charged with tax upon the whole amount of its capital stock of $26,200,000, amounting to $91,700. Defendant has paid $76,700 of said tax and has appealed from the remainder of said tax on the ground that it is levied on property outside of the taxing jurisdiction of the state of Pennsylvania, and that therefore the state has no right to tax said property and that the settlement is therefore invalid and unconstitutional.

2. We find the facts with reference to the situation and loaction of the property of defendant represented by its capital stock to be as follows:

The general office of the company is at No. 26 Exchange Place in the City of New York. Its capital stock is $26,200,000, and during the year ending as aforesaid there was declared and paid upon the said capital stock four dividends of 1¾ per centum each upon the 20th days of January, April, July and October respectively, making a total of 7 per centum for the year.

The main line of railroad owned by said company in Pennsylvania extends from the Pennsylvania and New York State line near Great Bend Village to the centre of a railroad bridge across

the Delaware river near Delaware Station, originally con-
239 structed jointly by the D., L. & W. R. R. Co., and the Warren Railroad Co., a corporation of New Jersey. The said main line of railroad in Pennsylvania is 114.61 miles in length. In addition thereto the company owns branch railroads in Pennsylvania as follows:

Lackawanna & Bloomsburg Branch, from Scranton to Northumberland, 80 miles.

Winton Branch, from Nay Aug to Winton, 7.50 miles.

Keyser Valley Branch, from Junction with main line to Keyser Valley, 6.43 miles.

Storr's Branch, from Storr's Junction to Storr's Mine, 2.80 miles.

The defendant also operates and has therein such interest as was conveyed by the agreement, a copy of which is hereto annexed and marked Exhibit A and made part of this finding, a railroad known as the Warren Railroad, extending from the center of the railroad bridge across the Delaware river hereinbefore mentioned to a point known as the Junction in the State of New Jersey, the said road being 18.80 miles in length, all in the state of New Jersey.

The Warren Railroad Co. from which the said Warren Railroad was acquired never owned any equipment, but the said road has been at all times and still is operated by the equipment furnished by the D. L. & W. R. R. Co. It is operated as part of the main line of the D. L. & W. R. R.

In addition to the railroads above mentioned the D. L. & W. R. R. Co. does now and did in 1889 operate under lease for the various terms of years the following railroads:

(Here followed a list of railroad lines, long and short, the greater number lying outside the state.)

The total miles of railroad owned, leased or controlled and operated by the D. L. & W. R. R. Co. is 891.41, of which 217.15
240 miles are in Pennsylvania, and 673.66 in New York and New Jersey. The total equipment owned by the D. L. & W. R. R. Co. was inventoried December 31, 1889, at $8,134,823. This equipment was used upon the entire system interchangeably with the equipment of such of the leased and controlled roads mentioned as possessed their own equipment; that is to say the leased equipment of roads in other states was used in Pennsylvania, and that owned by the D. L. & W. R. R. Co. was used in other states. It is difficult to determine precisely what should be considered the equipment of the roads in Pennsylvania and what the equipment of the roads outside of Pennsylvania. But we believe it would be fair to divide the aforesaid valuation of equipment owned by the company as follows, viz.:

Value of equipment for operation of roads in Pennsylvania	$5,075,342
Valuation of equipment owned by D. L. & W. R. R. Co. used on its road outside of Pennsylvania	3,059,481

The D. L. & W. R. R. Co. owns real estate outside of Pennsylvania located and valued as follows, viz:

Binghamton, N. Y.	$23,905.52
Buffalo, N. Y.	304,790.28
New York City	201,418.48
Rochester, N. Y.	23,185.03
Chicago, Ill.	51,740.60
Staten Island, N. Y.	1,609.35
Utica, N. Y.	50,388.05
Ore Lands in New Jersey	40,120.11
Syracuse, N. Y.	20,083.86

It also owns vessels, barges and tugs built, registered and used wholly outside of Pennsylvania of the value of $156,526.17.

241 3. The road owned by the D., L. & W. R. R. Co. in Pennsylvania was built primarily for the purpose of transporting to markets outside of the state the products of anthracite coal lands in said state; and the principal business of the railroads owned or leased and operated by said company in Pennsylvania does now and did in the year 1889 consist chiefly of the transportation of freight and passengers by continuous carriage upon a single way bill or ticket from points in Pennsylvania to points in other states, or from points in other states to points in Pennsylvania, or from points in another state passing through Pennsylvania to points in other states. The transportaton upon said roads in Pennsylvania of freight and passengers local to Pennsylvania, that is to say between points both of which are within said state, did not in the year 1889 exceed say 19 per centum of the entire transportation business conducted upon said roads.

The ownership, interest or estate of the D., L. & W. R. R. Co. in the Warren Railroad Company is and was in the year 1889 of a fair cash value of not less than $1,000,000. In this estimate we do not include the equipment of the Warren Railroad, which is owned by the D., L. & W. R. R. Co.

An analysis of the facts shows that the total miles of railroad owned, leased or controlled and operated by defendant in the states of Pennsylvania, New Jersey and New York, amounting to 2,891.41 miles there are in Pennsylvania 217.75 miles and outside of Pennsylvania 673.66 miles; and that defendant owns the equipment of 147.31 miles of the roads outside of Pennsylvania, the remaining 526.35 miles of road being equipped by the several corporations from which the defendant has leased said roads or which are controlled by it by reason of its ownership of stock therein.

242 As it does not appear from the evidence or findings of fact that the defendant has any of its property represented by its capital stock invested in these 526.35 miles of road we think they cannot be included in any computation of the proportion of the capital stock not taxable by the state of Pennsylvania. After excluding these we have a proportion of 217.75 miles in Pennsylvania and 147.31 miles outside of Pennsylvania upon which the equipment is owned by the defendant and is used interchangeably.

The total value of the equipment owned by it we have found to be $8,134,823, and therefore the proportion of defendant's capital stock represented by this sum is taxable only in the proportion thus indicated. It is true that the findings of fact show that the equipment owned by the other roads leased or controlled by the defendant is used interchangeably upon the roads of said companies and defendant's own road in Pennsylvania, but we think this furnishes no ground for including the mileage of said roads in the apportionment; for, if this were done, we must necessarily also have the value of their equipment, which is not given, and it is fair to assume that if their equipment was not used in Pennsylvania there would be a correspondingly larger proportion of the equipment owned by the defendant in this state.

The findings of fact show that the value of the leasehold interest held by defendant in the Warren Railroad is $1,000,600. This excludes the idea that any large proportion of capital stock of defendant is represented by said leasehold interest or is invested in said road, and therefore the only exemption which can be conferred upon defendant's capital stock is the exemption of $1,000,000 of its capital stock. In arriving at these proportions we assume
243 the value of assets to be the same as the par of the capital stock, the tax being levied on the basis of the amount of dividends declared and not upon the appraisement.

The legal questions here involved are practically the same as some of those which were considered in the case of the Commonwealth *v.* Pennsylvania Co., June Term, 1889, of Dauphin County Common Pleas, and for the reason there given, which we need not here repeat, we think that the amount of the capital stock of the defendant represented by the value of its equipment should be apportioned for the tax according to the proportions of 217.75 taxable and 147.31 miles not taxable, and that the amount of its capital which represents the value of its interest in the lease of the Warren Railroad, as well as the amount which represents its investment in real estate outside of the state of Pennsylvania, and the amount which represents its investment in vessels, barges and tugs built, registered and used wholly outside of Pennsylvania, are exempt from taxation by the state of Pennsylvania.

We embody these results in the following

Conclusions of Law.

1. Defendant is not liable to taxation by the state of Pennsylvania on so much of its capital stock as is represented by the value of its leasehold interest in the Warren Railroad; and the settlement hereby appealed from so far as its taxes said investment is erroneous and illegal.

2. Defendant is liable to taxation by the state of Pennsylvania only on $\frac{17431}{36898}$ parts of the whole amount of its capital stock invested in equipment, this being the proportion which the number of miles operated and equipped by it in the state of Pennsylvania bears

to the whole number of miles operated and equipped by it;
244 and the settlement appealed from so far as it taxes any greater amount of capital so invested is erroneous and illegal.

3. Defendant is not liable to taxation by the state of Pennsylvania on so much of its capital stock as is represented by the value of the real estate owned by it outside of Pennsylvania; and the settlement appealed from so far as it taxes said amount is erroneous and illegal.

4. Defendant is not liable to taxation by the state of Pennsylvania on so much of its capital stock as is represented by the value of its vessels, barges and tugs owned by defendant which were built and are registered and used wholly outside of the state of Pennsylvania; and the settlement appealed from so far as it taxes said investment is erroneous and illegal.

5. Defendant having paid to the treasurer of the state of Pennsylvania the whole amount of tax legally due of the settlement appealed from, judgment is directed to be entered in favor of the defendant, if exceptions be not filed within the time limited by law.

To the foregoing decision both parties filed exceptions.

Said exceptions being argued, one of them filed by the Commonwealth was sustained by the following additional finding:

The company defendant is a domestic corporation, having been duly chartered by the act of March 11, 1853, P. L. 163, which act, together with the acts therein referred to, and the supplements thereto, is made a part of this finding of fact.

The other exceptions being overruled and judgment entered in accordance with the decision filed, the Commonwealth took
245 this appeal, specifying that the court erred

1, 2, in the first and second conclusions of law.

3, in not holding that the whole of defendant's capital stock invested in equipment was taxable in Pennsylvania.

4, in not holding that the whole of defendant's capital stock invested in leasehold interests was taxable in Pennsylvania.

5, 6, in directing judgment to be entered in favor of the defendant, and in not directing judgment to be entered in favor of the plaintiff for the amounts claimed.

Mr. W. U. Hensell, Attorney General, and Mr. Jas. A. Stranahan, Deputy Attorney General for the commonwealth.

Counsel cited generally: Commonwealth *v.* Standard Oil Co., 101 Pa. 119; Pennsylvania *v.* Trenton Bridge Co., 9 Am. L. Reg. N. S. 298; Commonwealth *v.* Railroad Co., 29 Pa. 370; Commonwealth *v.* Railroad Co., 2 Pears. 391; Pittsb. etc. Ry. Co. *v.* Commonwealth, 66 Pa. 73; Pennsylvania Co. *v.* Commonwealth, 22 W. N. 340; Pullman's Palace Car Co. *v.* Commonwealth, 107 Pa. 156.

As to the taxation of the equipment of a domestic corporation: Commonwealth *v.* Dredging Co., 122 Pa. 386; Pacific R. Co. *v.* Cass Co., 53 Mo. 17; Orange R. Co. *v.* Alexandria, 17 Gratt. 176; Hays *v.* Steamship Co., 17 How. 596; St. Louis *v.* Wiggins Ferry Co., 7 Wall. 423; Sangamon, etc., R. Co. *v.* Morgan Co., 14 Ill. 163, 56 Am. Dec. 497; Welkey *v.* Pekin, 19 Ill. 160; Ontario Bank *v.* Bunnell, 10 Wend. 187; Burroughs on Taxation, 186; Cooley on

Taxation, 273; Balt. & O. R. Co. *v.* Allen, 17 Am. & Eng. R. Cas. 464.

246 As to its leasehold interest:

State *v.* Railroad Co. (44 Conn. ?), 7 Am. & Eng. R. Cas. 238; Archer *v.* Railroad Co., 102 Ill. 493 (7 Am. & Eng. R. Cas. 249);

Mr. M. E. Olmsted for the Appellee.

Distinguish Commonwealth *v.* Dredging Co., 122 Pa. 386, counsel cited:

Pullman's Palace Car Co. *v.* Commonwealth, 107 Pa. 156; Pullman's Palace Car Co. *v.* Twombley, 29 Fed. R. 658.

As to defendant's interests in the Warren Railroad:

Commonwealth *v.* Standard Oil Co., 101 Pa. 119; Commonwealth *v.* Dredging Co., 122 Pa. 386; Caldwell *v.* Fulton, 31 Pa. 475; Delaware, etc., R. Co. *v.* Sanderson, 109 Pa. 583; Cincinnati College *v.* Yeatman, 30 Ohio St. 276.

Per Curiam: We are unable to see that the ruling of the court below is in conflict with Commonwealth *vs.* Standard Oil Co., 101 Pa. 119. That company is a foreign corporation, and it was held that it was not the intention of our taxing acts to tax the whole capital stock of such corporations doing business within this Commonwealth irrespective of the place of its investment, but to tax the property of such company, that is to say its capital stock, to the extent that it brings such property within the state in the transaction of its business. This is the only equitable rule which will secure to the Commonwealth its fair proportion of tax and yet enable such corporations to carry on their legitimate business. For, if a corporation having its *situs* in one state and transacting business in every other state of this country can be taxed in each state to the full amount of its capital stock, the result is confiscation.

The defendant here is a domestic corporation, and it was

247 contended that its capital invested in equipment used interchangeably on its main line in this state, and its leased lines in other states, is not exempt from taxation in this state. The court below held otherwise, and from this decision the Commonwealth has appealed.

It is true that the *situs* of a domestic corporation is in this state, and that for many purposes the domicil of the person, whether natural or artificial, draws to it the personal property belonging to such owner. That this is so as to such intangible property as is not the subject of taxation elsewhere, such as money at interest, may be conceded; but for the purposes of taxation tangible personal property has a *situs* wherever it may be found. Hence it was held in Pullman's Palace Car Co. *vs.* Commonwealth, 107 Pa. 156, the said company being a foreign corporation, that the proportion of the capital stock of the company invested and used in Pennsylvania is taxable here, and that the amount of the tax may be properly ascertained by taking as a basis the proportion which the number of miles operated by the company in this state bears to the whole number of miles operated

by it, without regard to the question where any particular car or cars are used, this court saying in its opinion:

"They (the cars) are operated within this state. They are daily passing from one state to the other. They are used in performing the functions for which the corporation was created. The fact that they are also used and operated in other states cannot wholly exempt them from taxation here."

This case has recently been affirmed by the Supreme Court of the United States, although the report of the case has not yet reached us. On the other hand, we held in Commonwealth *v.* Dredging Co., 122 Pa. 386, that the dredges which were the subjects of the con-
248 troversy were taxable at the *situs* of the company for the reason that although wholly used outside of the Commonwealth they did not remain at any one place long enough to render them liable to taxation there, this court saying in its opinion:

"From the nature of the business it is in one place to-day and in another to-morrow, and hence not taxable in the jurisdiction where temporarily employed. It follows that if not taxable here it escapes altogether."

It may be that in the case of a domestic corporation the Commonwealth would have the power to tax its entire capital stock, no matter where found or how invested, and notwithstanding that the whole or the greater portion of its stock only was invested in tangible property located and used in other states and liable to taxation by the laws of those states. But the Commonwealth is not a bandit with a pistol at the throat of every property owner. On the contrary, she imposes no greater burdens than the necessities of the state require; and she endeavors at least to impose those burdens in as equitable a manner as the wisdom of the legislature and the difficulties of the subject admit.

We do not think it was error for the learned court below to hold that the defendant was not liable to taxation by this state on its interest in the Warren Railroad. That road is wholly outside of the state; and whatever the defendant's interest therein may be, it is liable to taxation by the state of New Jersey. We think it comes within the principles above indicated.

Judgment affirmed.

249 AMERICAN AND ENGLISH RAILROAD CASES (NEW SERIES), VOLUME 14, page- 145-174 (188 Penna., 169).

COMMONWEALTH

v.

NEW YORK, P. & O. R. Co.

(Supreme Court of Pennsylvania, Oct. 17, 1898.)

TAXATION—CAPITAL STOCK.—Within the meaning of the act of 1891 of Pennsylvania, providing for the taxation of "all the property of corporations * * * having capital stock, at the rate of five mills on each dollar of its actual value," a tax on the capital stock is a tax on the property and assets, including the corporate franchises.

SAME—SAME—DEDUCTION OF INDEBTEDNESS. Under such statute, the question of the actual value in cash of the capital stock is a question of fact, which must be determined by considering the value of the corporate property, and assets of every kind, including its bonds and mortgages, and moneys at interest, and its franchises and privileges, and the amount of the incumbrances on its property and franchises is also a relevant fact to be considered, but the corporate indebtedness, though it should be considered, is not to be specifically deducted from the valuation so ascertained and determined.

* * * * *

FINDINGS—PRESUMPTIONS.—Defendant's counsel having made no request for a specific finding as to what extent the value of its capital stock was effected by its indebtedness, it will be assumed that such element was properly considered.

VALUE OF CAPITAL STOCK—DISCRIMINATION.—Under such statute, the actual value of capital stock being a pure question of fact, a corporation cannot complain of discrimination in the method
250 adopted to ascertain such value, so long as its stock is not assessed in excess of such value.

Appeal by the company from Dauphin county court of common pleas. Affirmed.

The findings of fact and opinion of the court below are as follows:

This is an appeal from a settlement made by the auditor general and state treasurer against the corporation defendant June 30, 1896, for tax on capital stock for the tax year 1895. It was tried by the court without a jury, as provided by the act of April 22, 1874, and, on the testimony and documentary evidence, we find the following facts:

"(1) Defendant is a corporation chartered under the laws of the states of New York, Pennsylvania and Ohio, owning a line of railroad extending from Salamanca, New York, across the northwestern part of the state of Pennsylvania, to Dayton, Ohio, a distance of 388.04 miles. Of this line, 92.4 miles are within the state of Pennsylvania, and the remainder in either New York or Ohio. Defendant also owns a line of railroad 33.78 miles in length, known as the 'Franklin Branch,' extending from Buchanan to Oil City, all in Pennsylvania. It also owns a branch 7.7 miles in length in Ohio; making the total mileage owned by it 429.52 miles. It is also lessee of 168.09 miles of road, of which 34.54 miles are in Pennsylvania, and the remainder in Ohio. It connects at Salamanca, its eastern terminus, with the railroad of the New York, Lake Erie and Western Railroad Company, and by a connection at Dayton, Ohio, its western terminus, it forms, by means of leases and trackage contracts, part of the through line of the last named road from the city of New York to the cities of Cincinnati and Chicago.

"(2) Defendant's capital was, in 1895, $44,999,350, divided into
899,987 shares, of the par value of $50 each; 200,000 shares,
251 or $10,000,000, being preferred stock, and 699,987 shares, or $34,999,350, common stock. The cost of defendant's road and equipment was $170,987,519.58. No dividends were ever paid on either the preferred or common stock.

"(3) In 1895 defendant's indebtedness amounted to $129,853,080.72, as follows: Prior lien bonds, $8,000,000; first-mortgage bonds, $44,337,000; deferred warrants converted into first mortgage bonds, representing unpaid interest on $27,640,345.75; second mortgage bonds, $14,500,000; third mortgage bonds, $30,000,000; car trust agreements, subject to which the company held its active rolling stock, $1,950,000, and a small unsecured balance. Defendant has not for many years earned or paid any interest on its second or third mortgage bonds, and no interest was paid in 1895, on its first mortgage bonds, though some was earned. The interest on the $8,000,000 prior lien bonds was paid. Nearly all defendant's indebtedness is due to citizens or corporations of other states and countries than Pennsylvania.

"(4) In April, 1883, it leased its line and road to the New York, Lake Erie & Western Railroad Company, for ninety-nine years, the terms of the lease requiring the lessee to pay to defendant thirty-two per cent. of the gross receipts derived from the operation of the road. The gross receipts in the tax year 1895 amounted to $6,332,317.52, and the proportion due to defendant was $2,062,000. In 1893 the lessee became insolvent, and passed into the hands of receivers appointed by the circuit court of the Southern district of New York; and by virtue of an agreement not clearly explained in the evidence,
and of a decree of that court, the receivers were ordered to pay
252 to the defendant, instead of the agreed rental, only the net
earnings received from the operation of its road, not less, however, than $1,500,000; and defendant, during the tax year 1895, actually received as rental only $1,411,573.96, and it had during that time receipts from other sources amounting to $52,029.49. During its fiscal year ending June 30th, 1895, its gross income from all sources was $2,042,307.15, and during 1895 there were expended upon its road, in betterments, $2,931,686.31. From what source the amount thus expended was derived is not definitely shown by the evidence.

"(5) During the months of April, May and June of 1895, 4,200 shares of preferred stock of the defendant were sold, in the city of New York, at prices ranging from 62½ to 87½ cents per share, the average price being 75 cents. There were no shares of common stock sold during the tax year 1895.

"(6) An order of sale of defendant's road was granted in January, 1896, at the suit of the holders of the bonds secured by the first mortgage on its road and franchises; and, in pursuance of this order, all of its property, leasehold and otherwise, including defendant's franchises, was on the 26th of February, 1896, sold at public auction, at the court house in Akron, Ohio, for the sum of $10,000,000, subject to the prior lien mortgage of $8,000,000; and the proceeds of the sale were appropriated towards the payment of the first mortgage bonds, the holders of subsequent liens receiving nothing.

"(7) On February 21, 1896, the secretary and treasurer of the defendant company, after having taken the oath prescribed by the act of June, 1891, made the report to the auditor general required by

said act, and appraised the capital stock of said corporation as
253 of no value whatever. The auditor general and state treasurer being dissatisfied with the appraisement and valuation so made and returned, value- and appraised the capital stock of defendant for the tax year 1895 at $34,480,577.70, stating at length in their appraisement their reasons for so doing, and settled an account in accordance with said appraisement, charging defendant with a tax at the rate of five mills, amounting to $172,402.88, from which settlement defendant appealed to this court; and, on the trial, the report and appraisement made by the defendant's officers, the appraisement and settlement made by the auditor general and state treasurer, defendant's specifications of objections to the settlement, and other evidence, oral and documentary, was offered and heard.

"(8.) After a full consideration of all the relevant evidence in the case, we find that the appraisement made by the defendant's officers is not correct, and that the appraisement made by the auditor general and state treasurer is excessive; and we further find that the actual value in cash of defendant's capital stock, representing its tangible property and its franchises between the 1st and 15th of November, 1895, was $15,000,000, and that defendant is taxable for the tax year 1895, at the rate of five mills on 126.18—510.20 of said fifteen millions, that being the proportion of defendant's capital stock which represents the proportion of its road, property, assets, franchises and privileges in Pennsylvania, calculated on the mileage basis.

"Discussion.

"In Com. *v.* Standard Oil Co., 101 Pa. St., 119, Mr. Justice Paxson, delivering the opinion of the court, said: 'It has been re-
254 peatedly decided, and is settled law, that a tax upon the capital stock of a company is a tax upon its property and assets,'—citing a number of cases in this state, and many from other states. In Appeal of Fox, 112 Pa. St. 337, 4 Atl. 149, it was held that the mortgages owned by corporations are taxed through the tax on capital stock in substantially the same manner as the mortgages belonging to individuals are taxed by the act of 1885, which requires them to report to the assessors and pay a tax upon the par value of their mortgages, and that, if corporations were required to report and pay tax under that act of 1885, the result would be double taxation. Speaking in this case of capital stock in itself considered, Justice Paxson says: 'The capital stock is nothing, a myth; a mere name, excepting in so far ar it is represented by investments made with the money paid into the treasury of the corporation on account of such capital stock. Hence it is that the courts have long since declared that a tax upon the capital stock of a corporation is a tax upon the assets and property of such corporation.' The opinion of the court below in Com. *v.* Western Land & Imp. Co., 156 Pa. St. 455, 26 Atl., 1034, contains a history of this tax, and shows that it has always been assessed on the basis of the rate per cent. of dividends when the dividends during the tax year equalled or exceeded six per cent., and,

when no dividend was made, on an appraisement of the capital stock; and when the dividend was less than six per cent., under some of the acts, the tax was assessed on the basis of the rate per cent. of the dividend and, under others, on the assessed value of the capital stock. That case decides that, when the tax is measured by the rate per cent. of the dividend, that is the only test; and some of the cases there cited illustrate this very forcibly, and show that the
255 value indicated by the rate per cent. is sometimes very different from the actual value. Thus, in Atlantic & Ohio Tel. Co. *vs.* Com., 66 Pa. St. 57, where the report of the officers of the corporation stated that a dividend of ten per cent. had been made, it was held that the dividend reported furnished the measure of the tax, although the corporation proved that it has in reality been paid upon a part only of the stock. And in Columbia Conduit Co. *vs.* Com., 90 Pa. St. 307, where, after declaring dividends amounting to $200,000, a loss by fire occurred to which nearly one-half of the declared dividend was applied, instead of being paid to the stockholders, the whole dividend was, nevertheless, held to furnish the measure of the tax. And in Maston's Ford Bridge Co. *v.* Com., 117 Pa. St. 265, 11 Atl. 813, where all the property of a corporation with a capital of the par value of $45,000 was converted into money, and amounted to $75,000, the excess of $30,000 above the par value of the capital stock was held to be a dividend, and the company was assessed thereon with a tax of one-half mill on each one per cent. amounting to $1,500, which would be a three-mill tax upon $500,000. And in Com. *v.* Fall Brook Coal Co., 156 Pa. St. 488, 26 Atl. 1071, it was decided that a tax on the capital stock of the Fall Brook Railway Company was a tax on $3,500,000, which the Fall Brook Coal Company held invested in the shares of the railway company, and that to tax that amount of the capital stock of the coal company after the railway company had paid the tax on its capital stock would be double taxation.

"It thus appears that under the acts taxing capital stock, as they stood prior and up to 1891, the amount of dividend declared during the tax year was the only test of the amount of the tax, and that this had no necessary relation to the actual value of the capital
256 stock of the corporation. When the dividends did not amount to the rate which by the taxing acts was made the measure of the tax, the capital stock of the company was required to be appraised, and a tax at the rate of originally three mills afterwards five, was assessed upon its appraised value. This appraisement, it is true, was formally of the capital stock, and not of the property of the corporation; and the data required to be furnished to the auditor general, by the terms of the acts, to enable him to judge of the correctness of the appraisement, related to the operations of the company during the year, the amount of its capital stock, and the value of its shares, more directly than to the quantity, quality, and value of its assets and property. The inference sought to be drawn from this by the learned counsel for defendant is that, as the value of the shares would be affected by the amount of indebtedness and incumbrances upon the property of the corporation,

the practical result was that the tax, so far as it was a tax upon the property of the company, was a tax only on the value of its property, less the amount of its indebtedness and incumbrances; but it must be remembered that this basis of assessment was adopted in 1844, when the corporations to which it applied were mainly banks and other moneyed institutions which did not have incumbrances, and whose indebtedness was mainly for deposits that were a source of profit to the corporations.

The subjects of the tax are said in the act of 1844 (P. L. 486) to be 'all banks, institutions and companies.' An appraisement of the shares of such corporations at not less than the price at which they sold in the market would furnish a fairly accurate measure of the value of the assets and property of the company. That

257 by ' institutions,' in the act of 1844, the legislature intended moneyed corporations, is shown by the act of April 16, 1845 (P. L. 507), where the subjects of the tax on capital stock imposed by the act of 1844 are styled 'banks and savings institutions.' And in the capital stock act of 1859 (P. L. 529) the subjects of the tax are styled 'banks, savings institutions and companies whatsoever.' It was not until after the passage of the act of February 23, 1866 (P. L. 82), that banks ceased to be the principal corporations subject to the tax on capital stock. By the act of May 1, 1868 (P. L. 108), the amount of the dividend declared by the corporation was made the measure of the tax on its capital stock in every case where any dividend was made, and it was only in cases where no dividend whatever was made that the officers of the corporation were required 'to estimate and appraise the capital stock of such companies at its actual value in cash.' This act contains no suggestion that the appraised value should be the value of the property and assets of the corporation less its indebtedness. The act of April 24, 1874 (P. L. 68), which superseded the act of May 1, 1868, was practically identical with it on this subject, except that the officers of the corporation were required to estimate and appraise the capital stock of such companies upon which no dividend had been made or declared, at its value, not less than the average price which said stock sold for during said year;' and that it also contained the proviso 'that if the auditor general or state treasurer, or either of them, is not satisfied with the valuation so made and returned, they are hereby authorized and empowered to make a valuation thereof, and to settle an account upon the valuation so made for the taxes, penalties and interest due the commonwealth.' This proviso contains at least an implica-

258 tion that, even if the appraisement were not less than the average selling price, it might be too low, and no restriction was put upon the accounting officers in making the appraisement, nor did the act require them to deduct incumbrances. The act of June 7, 1879, required the capital stock to be appraised when no dividend or dividends less than six per cent. had been declared during the year and contained a further limitation of minimum value in the appraisement, by requiring not only that it should be "not less than the average price which said stock sold for during said year,' but also that it must be not less than the average price or value as

indicated or measured by the amount of dividends made or declared.' Under this act occurred the case of Hamilton Steeled Wheel Co. *v.* Com. 12 Wkly. Notes cas. 328, where $1,000,000, the whole capital of the corporation, had been invested in patent rights which would soon expire, and the officers of the company appraised the capital stock for the year 1879 at $110,000, and for the year 1880 at $100,000, on the theory that as the patent had only two years to run, and the whole value of the capital stock was invested in the patent, the stock was not worth more than that amount. The company, however, had made a dividend of four per cent., which, in the judgment of the accounting officers, indicated a value of at least $500,000, and they therefore assessed it at that amount. The court below decided that under the circumstances the value of the capital stock 'must be as measured and indicated by the amount of dividends made and declared. However unjustly it might operate in particular cases, there can be no doubt of its meaning and the manner of valuing which it indicates and points out.' On appeal to the Supreme Court, this ruling was affirmed, on the opinion of
259 the learned judge of the court below, President Judge Pearson. The next act in order was the act of 1889, which contained the same minimum limitation of value as the act of 1879.

"We thus find that, under all the acts taxing capital stock, the amount of tax was either fixed by the rate per cent. of the dividends (in which case that was the sole measure of the tax, regardless of the actual value of the property and assets of the corporation), or it was imposed on the appraised value of the stock, subject to the limitation in the earlier acts, that the amount of the appraisement should not be less than the value indicated by the selling price of the stock (which would fairly indicate its value when the subjects of the tax were banks and institutions of that nature), and afterwards by the limitation that it should not be less than the value indicated by the amount of dividends or profits made. The nature of the test of value was in all cases an inquiry into the result of the activity of the corporations for the tax year, and an inference of value from these results, rather than a direct estimate of the value of the tangible property and assets of the corporation. There was, we think, ample reason for this. The value of the property and assets of a railroad corporation, for instance, cannot be ascertained by appraising its buildings, rails, bridges, cars, etc. It is all these in operation—their use as a railroad, with the franchise or right to use them, and to charge fares and freight for so doing—that really constitute the property and assets of the corporation; and this is what is represented by its capital stock. There has been, however, a large class of cases in which it became necessary to have a more direct reference to the tangible property and assets of the corporation in making the appraisement. This was so in all cases where, by the terms of the taxing act, or because of the nature or *situs* of the property
260 of the corporation, some of it was subject to taxation, and some exempt. Thus, the capital stock of manufacturing corporations has been since 1885 exempt from taxation; but as this exemption was held to apply only to the proportion of the capital

stock that represented property actually used in the business of manufacturing, while property not so used was held taxable, it became necessary to ascertain the value of the property in order to determine the proportion of the capital stock taxable and exempt. And when corporations, whose capital stock was subject to the tax, owned property which could not be taxed because of its nature,—as, for instance, patent rights or United States bonds,—or because it was located out of the state, it became necessary to ascertain the actual value of the property. Com. *v.* Westinghouse Air Brake Co., 151 Pa. St. 276, 24 Atl. 1111, 1113; Com. *v.* Westinghouse Electric & Mfg. Co., 151 Pa. St. 265, 24 Atl. 1107, 1111; Com. *v.* Juniata Coke Co., 157 Pa. St. 507, 27 Atl. 373; Com. *v.* Pennsylvania Coal Co., 5 Co. Ct. R. 89, and Com. *v.* Montgomery Lead and Zinc Min. Co., *Id.* 91,—are cases of this kind, as is also Com. *v.* Standard Oil Co., 101 Pa. St. 119.

"Another like case is Com. *v.* Pennsylvania Co., 145 Pa. St. 274, 23 Atl. 549, to which the learned attorney general has referred. This case was elaborately argued and considered in the court below, where it was conceded that if the corporation was taxable at all, which was denied, the tax was upon its property and assets, and that the value and nature and *situs* of these must be ascertained in order to determine the amount of the tax, and the date from which these could be ascertained was furnished by the defendant. The
261 court below decided that the defendant was taxable on the amount of its capital stock represented by investments in real estate in Pennsylvania, personal property in Pennsylvania stocks of foreign corporations, bonds of foreign corporations, and bonds of domestic corporations, and on the proportion of its capital stock represented by investments in equipment or rolling stock which was found to be within the state, by apportioning the whole amount invested in equipment on the basis of its mileage within and without the state, as shown by the facts and exhibits. The case was appealed to the supreme court, and error was there assigned to these rulings, and to these only; and the case was argued on the questions thus raised, but none of these questions were decided by the supreme court. The only point decided was, as stated at the close of the opinion (145 Pa. St. 283, 23 Atl. 552), 'that after the lapse of a year from the time of payment of the taxes of a current year, without any request for the restatement of the account of the taxpayer, the account is closed, except as to clerical mistakes, and can only be reopened by an order of the board of revision.' This was an application of the provisions of section 16 of the act of March 30, 1811, relative to public accounts (which had been applied by the court below to the settlements for 1872 and 1873, because for those years the accounts were resettlements), to the settlements for the subsequent years, which were original settlements, and not resettlements. That this was done under a misapprehension of the facts is manifest. The learned justice who wrote the opinion evidently supposed that all the state taxes to which a corporation is subject for a given year are settled and included in one account, and did not know that it is,

and always has been, the uniform practice of the accounting
262 department to require reports and settle accounts separately for each kind of tax to which a corporation is subject, and that a settlement for one kind of tax does not imply any consideration or determination of its liability or otherwise for tax of a different kind. An account or settlement is a physical, tangible thing,—a paper with figures and writing upon it, signed by the auditor general and state treasurer, indorsed, copied into a ledger, and filed away in its appropriate place. Whether such a settlement has been made against a given corporation, for a tax of a given year, is therefore a question of fact, to be ascertained by looking in the proper place for the settlement. Such inspection showed at the time this case was tried, and it would now show, that there had never been any settlement made against the Pennsylvania Company for the years from 1874 to 1887, inclusive, for tax on capital stock; and the court below found this as one of the facts in the case. The settlements then in question for those years were therefore original settlements, and not resettlements, as was supposed, while those for 1872 and 1873 were resettlements; and this is the reason why the court below held the latter invalid, and those for the subsequent years valid. It was not claimed by the counsel for defendant, who are experts in tax cases, that the settlements for the years subsequent to 1873 were resettlements; and therefore the ruling of the court below on this subject was not assigned for error, and hence the supreme court were not assisted by the argument of counsel in coming to the conclusion reached by them which probably accounts for the misapprehension. The result is that we are without a decision of the court of last resort on the question decided in the court below, and discussed in the supreme court. The case is, however, valuable, as it shows that
263 it was conceded and understood, both by the counsel and the court, that the tax in question was the tax upon the property of the corporation, the value of which it was necessary to appraise, and that the only controversy—if the corporation was taxable—was as to the method of apportionment, and that it was not even suggested by the learned counsel that the indebtedness of the corporation should be deducted in order to ascertain the value.

"We have now reviewed all the acts taxing capital stock prior to the act of June 8, 1891 (P. L. 229), and referred to many of the decisions in which these acts are construed and applied; and we have nowhere found it to be enacted or decided that, in estimating and appraising the value of the capital stock, any deduction is to be made because of the fact that the property of the corporation is incumbered. This question has, it is true, never been directly litigated and adjudicated, but the implication contained in the acts, from the fact that there is no provision on the subject, and that no claim has ever been made for a deduction of this account, is strong that such was not the intention of the acts. It remains to consider the effect of the act of 1891, under which the settlement appealed from in this case was made. The title to this act is 'An act to provide increased revenues for the purpose of relieving the burdens of local taxation * * * and providing for greater uniformity

of taxation by taxing all the property of corporations, limited partnerships and joint stock associations having capital stock, at the rate of five mills on each dollar of its actual value.' We think we find here a distinct declaration that the purpose of this act is to impose a tax upon the property of the corporation to which it applies.

Defendant's counsel contends that the antecedent of 'its,'
264 in the concluding words of the title, "five mills on each dollar of "its" actual value,' is 'capital stock.' But the plain reading of the sentence, required alike by its grammatical and logical construction, is that it declares an intention to tax 'at its actual value in cash all the property' of certain corporations, limited partnerships, and joint-stock associations, to wit, those 'having capital stock.' This construction is not in conflict with the expressions used in preamble 6, where it is evident that 'capital stock' is used as a synonym for bonds, mortgages and moneys at interest, and franchises and property of other kinds; and, being so used in the preamble, we think we are warranted in assuming that it is used in the same sense in the body of the act. This act also made important changes in the method of assessing the tax. The rate per cent. of dividend is no longer the measure of the amount of tax, but in all cases the capital stock is to be estimated and appraised by the officers of the corporation 'at its actual value in cash, not less, however, than the average price which said stock sold for during said year, and not less than the price or value indicated or measured by net earnings or by the amount of profit made and either declared in dividends or carried into surplus or sinking fund.' And the act further provides 'that if the auditor general and state treasurer, or either of them, is not satisfied with the appraisement and valuation so made and returned, they are hereby authorized and empowered to make a valuation thereof, based upon the facts contained in the report herein required or upon any information within their possession or that shall come into their possession, and to settle an account on the valuation so made by them for the taxes, penalties and interest due the commonwealth thereon.' And, while it is the capital
265 stock that is to be appraised, we have just seen that the title of the act declares that the property is to be taxed, and preamble 6 defined what is meant by 'capital stock' when it declared that the tax is to be imposed on 'their whole capital stock,' including as well their bonds, mortgages and moneys at interest, as their franchises and property of other kinds.'

"In settling accounts against various corporations for the first year after this act came into force, the auditor general construed the proviso that the actual value in cash was to be 'not less than the price or value indicated or measured by net earnings or by the amount of profit made and either declared in dividends or carried into surplus or sinking fund' to prescribe a hard and fast rule that the capital stock must be appraised at not less than a principal sum, six per cent. of which would equal the net earnings of the corporation for the tax year. And he settled accounts on that basis against a number of corporations, from which settlements they appealed to this court, where, on the trial of the cases, it was decided

that this construction of the act was erroneous; that the net earnings constituted only one fact to be considered in determining the actual value of the capital stock, and that the amount and rate per cent. of dividends made and the amount accrued to surplus and sinking fund during the tax year do not furnish an absolute indication or measure of the actual value in cash of the capital stock of a corporation, but are to be considered with all other relevant facts in determining what is its actual value; that the prominent idea or thought of the whole act was to base taxation on the actual cash value; and that this should be determined from facts, and not theories, on all cases except the one that this value should in no case be less than the average price at which the stock sold during the year.

266 Com. *v.* Edgerton Coal Co., 164 Pa. St. 284, 30 Atl. 125, 129. And in Commonwealth against Haney Transfer Co. (141, Jan. term 1895), decided by this court, and not reported, it was said, in the opinion of Judge McPherson, that the question of actual value in cash is a question of fact, which must be determined by considering the value of defendant's tangible property, the amount of business, the rate of dividend declared, and the extent and value of its good will and franchises and privileges, as indicated by the evidence bearing upon those subjects at that particular time. In Com. *v.* Delaware, S. & S. R. R., 165 Pa. St. 44, 30 Atl. 522, 523, it was contended by the defendant that the franchises of a corporation were not to be included and appraised in estimating the value of its capital stock. But we decided that the franchise of the corporation was an element to be considered in ascertaining the value of capital stock; and it was said in the opinion of the supreme court, affirming this decision (page 54, 165 Pa. St., and page 523, 30 Atl.): "In ascertaining the actual value of the capital stock, was it proper to take into consideration, as affecting that value, the franchises of the company? We think this question is affirmatively answered by the act of June 8, 1891, under which the valuation was made. The capital stock represents the franchises as well as other property of the company. In the sixth preamble of the act there appears a plain legislative purpose to include the franchise in fixing the value of the stock, and this is in harmony with the title and the provisions in respect to the taxation of it.'

"The able counsel for defendant lays great stress on the fact that, in the taxing acts and in the decisions of the courts construing them, it is the capital stock which is said to be taxed, but a care-

267 ful reading of the acts and the decisions will show that the words 'capital stock' are used as a convenient term to connect property, tangible and intangible, of the corporation. This is implied when it is said that a tax on the capital stock is a tax on the property and assets of the company; and when it is enacted that the tax shall be 'at a fixed rate of five mills upon each dollar of the actual value of their whole capital stock, including as well their bonds, mortgages and moneys at interest, as their franchises and property of other kinds;' and more definitely still when it is declared, in the act of 1891, 'that for the purpose of this act interests in limited partnerships or joint stock associations shall be deemed to be capital stock and taxable accordingly.' That is to say, as a matter of fact,

a limited partnership has no 'capital stock,' in the common acceptation of the term, but every partner has a definite proportional interest in the assets of the company, and, for the purpose of taxation under this act, this interest 'shall be deemed to be capital stock and be taxable accordingly.' Clearly, then, when nominally the capital stock is taxed, it is in reality the property and assets of the company that are taxed, and the only way in which the value of the capital stock can be ascertained is by ascertaining the value of the property and assets. This illustrates the truth of the remark made by Mr. Justice Paxson, already quoted, that 'the capital stock is nothing; a myth, a mere name, excepting in so far as it is represented by investments made with the money paid into the treasury of the corporation on account of such capital stock.' In a limited partnership it is literally nothing but a name apart from the assets, and in a corporation proper it is really nothing more, although we are accustomed to conceive of it as a separate entity.

268 "Counsel also argues that the form of the report required to be made by the act of 1891 does not call for a statement of the amount and value of the property and assets of the corporation, and, therefore, that it is not the property that is to be appraised. But, as we have seen, the value of the property must be ascertained whenever the tax is to be apportioned or a limited partnership is to be taxed, and, while it is true that the form of the report does not call for such definite information as to the actual value of the property and assets of the corporation as it might, the reason probably is that in the main it was copied from the prior acts without careful attention to the change.

"The conclusion that the value of incumbrances should not be deducted would seem to be greatly strengthened when the matter is examined in the light of the doctrines in Com. *v.* Fall Brook Coal Co., 156 Pa. St. 488, 26 Atl. 1071. It is there decided that the capital stock of the corporation, and the shares into which the capital is divided, are, at least for the purpose of taxation, identical, and that the shareholders are the real owners of the property and assets, which both the capital stock and the shares represent, and that they are the persons who are taxed when a tax is imposed upon either the capital stock or the shares. A corporation is (page 494, 156 Pa. St., and page 1071, 26 Atl.) said to be 'an artificial person created by law for the purpose of becoming the business representative, agent, or trustee of so many persons as may join to furnish the money with which the business to be done by the corporation may be carried on. * * * The money furnished by those whose representative it is to be is its capital stock. The amount that each person contributes to this fund is his share in the venture, and is called his

269 share or shares in the stock. The legal title to the whole sum so contributed is in the corporation, and so the legal title to all the property, real or personal, in which it may be invested. The equitable title—that is, the right to the profits from the business done, and to a return of the capital when the corporation is dissolved—is in the stockholders. * * * As in the ordinary case of trustee and *cestui que trust*, the real owners are the beneficiaries.

The opinion in this case also states that the principle upon which it is proper to tax land without regard to the incumbrances upon it is that there is no community of interest between the owner of the land and the owner of the money borrowed and invested in the land, and that to tax both is not double taxation; that 'in that case there are two distinct subjects of taxation, each of which is made taxable by an express provision of the law. The farm is taxable as land, against whoever may be the owner, without regard to the incumbrances upon it. The sum secured by the mortgage is taxable as money at interest, regardless of the use the borrower may make of it. If the owner of the land is compelled to incumber it, it may be his misfortune; but the man who lends money to him has no connection with him in title. There is in such case no double taxation. The land is taxed once to its owner. The money at interest is taxed once to its owner. They are distinctly different taxpayers, and pay taxes upon distinctly different subjects of taxation.

"We have, then, these principles: A tax on the capital stock of a corporation is a tax on its property and assets. The corporation is simply a trustee for its stockholders, and they are the real owners of the property, or, as expressed by the learned justice, it is 'the ordinary case of trustee and *cestui que trust*.' The beneficiaries
270 are the real owners. And whether the property is taxed in the name of the corporation or in the name of the shareholders, the ultimate burden falls upon the same persons. The fact that the tax is called a tax on capital stock is therefore not of the essence of the matter. Whatever called, it is a tax on the property and assets of the shareholders for whom the corporation is simply trustee. Neither is it vital that it is taxed in the name of the trustee. The shareholders are the real owners of the property taxed, and the tax is therefore a tax on their property. But, when the property of individuals is taxed, no reduction is made because the property is incumbered. It is therefore not easy to see why there should be any specific reduction made for individuals simply because their trustee is a corporation. As was said by Mr. Justice Miller, in State Railroad Tax Cases, 92 U. S., at page 605: 'Individuals do not escape taxation on their real and personal property because they are insolvent. * * * No state has ventured to establish the principle of permitting its visible tangible property to escape taxation, relying solely on a tax imposed on the individual on the basis of his estimated wealth in excess of his debts.' The consequence of establishing such a principle in Pennsylvania would be so serious that we cannot believe the legislature has ventured so to do. There are, as is well known, many railroad corporations in the state, which like the one in question in this case, were built at an extravagant cost, met chiefly by borrowed money, which are now insolvent, and whose net earnings are not sufficient to pay the interest on their sometimes enormous funded debt, yet they are valuable franchises which have been granted by the state, as well as tangible property,
which, for the uses to which it is applied, is worth in many
271 cases millions of dollars. All these, under the construction of the act of 1891 contended for on behalf of defendant, would entirely escape taxation by the state, and are not subject to

local taxation, while the property of individuals who have no franchise from the state is taxed without regard to their insolvency. And the injustice and impolicy of such a construction is presented in a yet stronger light when we remember that in many cases—and notably in the one now before us—nearly all the funded debt secured by the incumbrances on the insolvent corporation's property is held by residents of other states or foreign countries; so that, if it is not taxable against the insolvent corporation, neither can it be reached, in theory even, by taxing the evidences of indebtedness. The result would be that property within the borders of the state worth many millions of dollars would be entirely exempted from taxation.

"Conclusions of Law.

"(1) A tax on the capital stock of a corporation is a tax on its property and assets, including its franchises. The question of the actual value in cash of the capital stock is a question of fact, which must be determined by considering the value of defendant's tangible property, and assets of every kind, including its bonds, mortgages and money at interest, and its franchises and privileges; and the amount of the incumbrances on its property and franchises is also a relevant fact to be considered, but it is not to be specifically deducted from the valuation so ascertained and determined.

"(2) The commonwealth is entitled to recover from defendant in this case a tax at the rate of five mills on the dollar on the actual value in cash of 126.18–510.20 parts of the capital stock of
272 defendant amounting to.....with interest at the rate of twelve (12) per cent. from September 30, 1896, and attorney general's commission at the rate of five (5) per cent.

"(3) Judgment is therefore directed to be entered in favor of the commonwealth and against the defendant as follows:

Tax, five (5) mills on.....
Interest at twelve (12) per cent. per annum from October 1, 1896, to April 8, 1897.
Attorney General's commissions, 5 per cent.....

Total .....

M. E. Olmsted, for appellant.

John P. Elkin, Dep. Atty. Gen., and Henry C. McCormick, Atty. Gen., for the Commonwealth.

DEAN, *J.:*

All the material facts of this case are stated in the opinion of the court below. The finding of a fact determines the amount of the judgment. The accounting officers of the commonwealth and the court adopted a like construction of the statute, but, differing in their views of the evidence, differ in results. The officers of the defendant corporation, putting a wholly different construction on the statute, largely differ from both as to the fact. The defendant

appraised its capital stock as of no value whatever. The commonwealth appraises it at $4,480,577.70. The court below appraises it at less than half that amount. The main dispute between the commonwealth and defendant is as to the construction of the act of 1891. It may be conceded at once that the legislative intent to levy the higher amount must be express, or result from necessary implication; for, if in a tax law the intent is doubtful, it does not exist.

273 The title of the act declares the purpose to be to tax "all the property of corporations, limited partnerships and joint stock associations having capital stock, at the rate of five mills on each dollar of its actual value." Could legislative language be plainer? All the property of corporations is to be taxed at the rate of five mills on each dollar of its actual value. The words "having capital stock" are used to distinguish such corporations from beneficial, religious and other corporations having membership, but not capital stock representing the respective interests of members in the corporate property. Then, preamble 6 of the act further declares it to be the purpose to tax "all corporations, limited partnerships and joint stock associations having capital stock, at a fixed rate of five mills upon each dollar of the actual value of their whole capital stock, including as well their bonds, mortgages and moneys at interest, as their franchises and property of other kinds. In Com. *v.* Standard Oil Co., 101 Pa., St. 119, speaking by Paxson, *J.*, this court held: "It has been repeatedly decided, and is settled law, that a tax upon the capital stock of a company is a tax upon its property and assets." Then in Appeal of Fox, 112 Pa., St. 354, 4 Atl., 155, it is said: "The capital stock is nothing—a myth; a mere name, excepting in so far as it is represented by investments made with the money paid into the treasury of the corporation on account of such capital stock. Hence it is that the courts have long since declared that a tax upon the capital stock of a corporation is a tax upon the assets and property of such corporation." In Com. *v.* Delaware, S. & S. R. Co., 165 Pa., St. 44; 30 Atl., 522, 523 (opinion by McCollum, *J.*), we said: "In ascertaining the actual value of the capital stock, was it proper to take into consideration, affecting the value, the

274 franchise of the company? We think this question is affirmatively answered by the act of June 8, 1891, under which the valuation was made. The capital stock represents the franchises as well as other property of the company. In the sixth preamble of the act there appears a plain legislative purpose to include the franchises in fixing the value of the stock, and this is in harmony with the title and provisions in respect to the taxation of it." There are other cases to the same effect. The statute having thus, in express terms, declared the subject of taxation to be all the property of corporations having capital stock, and the settled interpretation by this court of a tax on capital stock of a corporation being that it is a tax upon all the property of the corporation, it is clear the learned judge of the court below committed no error in the first sentence of his conclusion of law, thus: "A tax on the capital stock of a corporation is a tax on its property and assets, including its franchises."

The main contention, however, is over the last part of the conclusions, as follows: "The question of the actual value in cash of the capital stock is a question of fact, which must be determined by considering the value of the defendant's tangible property and assets of every kind, including its bonds, mortgages and moneys at interest, and its franchises and privileges, and the amount of the incumbrances on its property and franchises is also a relevant fact to be considered, but it is not to be specifically deducted from the valuation so ascertained and determined." The contention of the appellant's counsel in substance is that, to ascertain the actual value, there should be deducted the amount of the corporation indebtedness from the aggregate fairly appraised value of the corporate property. The remainder would then represent the actual value of the capital stock.

This would in many cases hide the tangible property, and
275 turn the commonwealth over to the assessment and collection of its revenues from nothing; in the face, too, of what we have repeatedly decided—that a tax upon the capital stock of a company is a tax upon its property and assets. The legislature might have so worded the statute that such result as that contended for would follow, namely, that solvent corporations should pay taxes, and insolvent ones not; but, with our decisions in 1882 and 1886, and the declared law long preceding them, that "capital stock" in taxing statutes, meant the property and assets of the corporation, before them, they declared, in the act of 1891, precisely to the contrary. In fact, from the wording of preamble 6 of the act of 1891, we do not doubt that, at least, the framer of the act was familiar with the opinion of this court in Com. *vs.* Standard Oil Co., *supra*.

In supporting their arguments on either side, counsel have given undue significance to the indebtedness of the corporation. Strictly speaking, in view of the purpose of this statute, the debt is almost as much of a myth as the certificate of capital stock. The declared purpose is to tax the capital stock by ascertaining its value in view of the tangible assets of corporations, what was owing to them, the value of their franchises, and the rights and privileges they possessed under their grants. The commonwealth no more sought, by the act of 1891, to ascertain and tax the net assets of these artificial beings, than, by the usual tax laws, she seeks to tax the net assets of natural ones. In the latter case she rarely inquires as to what the taxpayer owes. She does ask what he is possessed of. It is only when the attempt is made to tax his creditor that, incidentally, what is owing by the debtor becomes of interest to the taxing power. We have no hesitation in holding that it would be manifest
276 error to adopt the amount of the debt as a part of the value of the corporate property; and it would be just as erroneous to hold that it should be deducted from the aggregate value of the property, and thereby withdraw tangible property to that extent from taxation. In either case it would be dragging in a fact of but slight consequence, and making it the prominent and controlling one in the issue, in the face of the declared purpose of the statute to tax the actual value of the capital stock, as indicated by the franchise and property. In the case of Com. *v.* Standard Oil Co., *supra*,

Paxson, *J.*, in referring to the fact that the certificates of stock were in possession of the owner in Ohio, where the corporation was domiciled, says: "It follows, necessarily, that the shares of stock in a Pennsylvania corporation, held by a corporation or individual domiciled in another State, cannot be taxed here. One sufficient reason is that there is nothing here to tax. The capital stock—that is, the property and assets—are here, and are taxed." In other words, the shares themselves, which represent the owner's interest less debts, have so little to do with the subject of taxation—the capital stock—that it is immaterial where they are held, or who holds them. The property and assets—the capital stock—being in this State, that, alone, is within reach of the taxing power. Now, what change is worked in this tangible property by subjecting it to a debt of the owner? In the case cited, the certificates and owner were both in a foreign jurisdiction; yet, the property and franchise being within the jurisdiction, the authority of the commonwealth to tax the capital stock, on ascertaining its value from what was within the jurisdiction, was upheld. If he cannot withdraw his tangible
277 property from taxation, by taking his title to it, and person, outside state boundaries, how can he do so by voluntarily pledging it for a debt? That the owner subjects it to a debt in no way changes the relation of the commonwealth to it as a subject of taxation. It constitutes precisely the same capital stock as before. His relation to his own property has been somewhat changed, for, by the mortgage debt, he has admitted others to a share of the income, and has given them a lien for their debt. His title, however, remains just the same as if the owner of the legal title to land had placed a mortgage upon it. All the indications of ownership, the possession of the deed, and dominion over the property, continue, as if no debt had been created. As is said by our Brother Williams in Com. *v.* Fall Brook Coal Co., 156 Pa., St. 488, 26 Atl. 1071, speaking of the power of the commonwealth to tax the land as well as the mortgage upon it: "In that case there are two distinct subjects of taxation, each of which is made taxable by an express provision of the law. The farm is taxable as land, against whomsoever may be the owner, without regard to the incumbrances upon it. * * * The land is taxable once to the owner. The money is taxed once to its owner. They are distinctly different taxpayers, and pay taxes upon distinctly different subjects of taxation." The debt as an item of evidence, may have bearing in fixing the value of the franchise; but from the nature of the property, and the character of the debt, its affirmative weight in establishing value is significant; for of all forms of debt, as an indication of actual value of the thing pledged, the ordinary railroad mortgage is the most unreliable, and especially is this the case when the mortgage is executed to
carry out a reorganization plan of security holders in a bank-
278 rupt road. Without adverting further to the history of this road it is sufficient to say that its mortgage debt is always far in excess of any possible value of the property. We do not know just what prominence was given by the learned Judge of the court below to the amount of indebtedness in reducing the actual value of

the capital stock. He says, in the conclusion of law already quoted, that the question of actual value in cash of the capital stock is one of fact, to be determined by considering the value of defendant's tangible property, etc. "And the amount of incumbrances on its property and franchises is also a relevant fact to be considered, but it is not to be specifically deducted from the valuation so ascertained and determined." That he gave no weight whatever to it, even as affirmative evidence tending to establish the value of the stock as claimed by the commonwealth, is clear. That he treated it as a relevant fact favoring defendant, and tending to reduce the actual value, although not to be specifically deducted. is also clear; and in this he was correct. That a large debt, one largely out of proportion to the value of the property, secured by mortgage, with interest payable semi-annually, constituting what is called a "fixed charge," seriously depreciates the actual value of the property, cannot be questioned. Default in any payment of interest puts the property in peril of seizure and sale to satisfy not only the overdue interest, but the whole debt. A property heavily incumbered, as is this one, is liable to pass into the hands of the mortgage creditors at any time. But counsel for defendant planted himself on a demand for an absolute deduction of the whole amount from the appraised value, and made no request for a specific finding of fact in this particular. It was not, therefore, incumbent on the court to specify in the
279 finding exactly what weight was given to a particular fact; and we assume that it had all the effect that it was entitled to.

The argument that different methods were adopted by the commonwealth's officers in ascertaining the actual value of the capital stock of corporations, and therefore, there has been want of uniformity and a discrimination, is not well founded. As the learned Judge of the court below shows, prior to the act of 1891 the basis of taxation value, by the taxing acts, was the net earnings; but the latter act declares that the capital stock shall be appraised "at its actual value in cash, not less, however, than the average price which said stock sold for during said year, and not less than the price or value indicated or measured by net earnings, or by the amount of profit made, and either declared in dividends or carried into surplus or sinking fund." A minimum appraisement is here fixed for solvent corporations. In most cases, doubtless, the corporation officers and the commonwealth, in estimating the actual value of a sol-ent, well-managed road, would adopt it—and properly, too—as a fair basis in estimating the actual value of the capital stock. But the act of 1891 was intended to reach also the bankrupt road, which may have the same mileage, the same traffic, and the same privileges as the solvent one. The state conferred upon it the right of eminent domain, for location and extension of branches or feeders, as well as for necessary improvements. Being constructed, it now has the right, under the protection of the laws, to operate it in carrying freight and passengers. As the same rule for a fair estimate of the actual value of the capital stock cannot be adopted as in case of the solvent roads, and the commonwealth's officers being dissatisfied with the corpor-
280 ate officers' appraisement, they proceed, under the authority expressly given, to make an appraisement, upon the facts in

the report, and other information within their possession. Upon appeal, the court differs from them in their inferences, and reduces largely the amount subject to tax. On the number of miles of road in Pennsylvania—about 127 of a total of 430—with a capital stock of the actual value, as a whole of $15,000,000, the court fixes the actual value of the capital stock of the 127 miles in this state at only a little over $3,500,000. The method of determining the proportion of stock taxable in Pennsylvania has been repeatedly decided to be the correct one. The figures, certainly, do not indicate an excessive valuation of the capital stock of 127 miles of railroad. As between the defendant and solvent roads of the same physical character, there is no discrimination as concerns results, in favor of the solvent ones; for the latter are rated as high as $40 to $52 per share, while this one is less than one-third that amount. The actual value being a pure question of fact, appellant has no standing to complain of discrimination in methods, so long as its stock is not assessed in excess of that value. It may be that the Reading and some other corporations are taxed on less than the actual value of their capital stock. If so, the commonwealth is not here appealing, and consequently it is not our business to inquire into the matter. We can only say that, after a most careful examination of the whole case, we find neither error of fact nor law in the judgment of the court below, and it is therefore affirmed.

MITCHELL, *J.*:

I dissent in this and kindred cases, known as the "Capital Stock Cases," because I am of opinion that the decision is founded on a fundamental error, in confusing a tax on the property of
281 the corporation with the tax on the property of the individual shareholder therein, which is what the statute imposes. The subject matter of taxation under the act of June 8, 1891, is capital stock, *eo nomine*, independently and without reference to the property which it represents. It is to be taxed at its "actual value in cash, not less however than the average price which said stock sold for during said year," etc. The officers of the corporation concerned are required to make sworn returns under seventeen specific heads, all of which tend to show the value of the stock as such, and not a single one of which refers directly or indirectly to the value of the property which such stock represents. The value of the capital stock in the hands of the shareholders is the value of their resulting interest in the property of the corporation subject to its debts and incumbrances, in view of the use to which it may be put under its corporate franchises, etc.; and the value of such resulting interest is the true subject of tax under the statute. As construed by this decision, the tax is put on the value of the property of the corporation, without regard to the value of the capital stock in the hands of the shareholders. This is a total change in the subject of taxation, without any warrant in the statute, and against its plain language and intent.

GREEN and WILLIAMS, *JJ.*, join in this dissent.

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EXHIBIT G.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6–5–1905.

DEAR SIR: Below please find movements of N. Y. C. Car numbered 90350 from Weehawken to San Francisco.

C. H. EWINGS,
Car Acc't.

MOVEMENTS.	MONTH.	DAY.	YEAR.	L. OR E. TIME.	TRAIN.	CON.
Rec'd from				M.	Mo. Pacific.	
From W'kn.	3	2	04	M.	C. R. I. & P.	
To Susp. Bridge	3	4		M.	Mo. Pac. 7–2	
To M. C.	3	4		MM.	C. B. & Q. 7–11	
To Chicago Belt	3	8		M.	C. G. W. 7–11	
To C. G. W.	3	9		M.	Wabash 7–12	
To K. C. C. B.	3	13		M.	M. C. 7–23	
To C. B. Q. & Mo. Pac.	3	13		M.	N. Y. C. 7–31	
To D. & R. G.	3	17		M.		
To R. G. W.	3	18		M.		
To So. Pacific	4	19		M.		
To R. G. W.	4	10		M.		
To D. & R. G.	5	16		M.		
To Mo. Pac.	5	2		M.		
To D. & R. G.	5	3				
Del'd to Mo. Pac.		19				

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6–5–1905.

DEAR SIR: Below please find movements of N. Y. C. Car numbered 63379 from Weehawken to Minneapolis.

C. H. EWINGS,
Car Acc't.

MOVEMENTS.	MONTH.	DAY.	YEAR.	L. OR E. TIME.	TRAIN.	CON.
Rec'd from				M.	To Erie 4–27	
From W'kn.	3	11	04	M.	N.Y.C.&St.L. 5–18	
To Susp. Bridge	3	14		M.		
To Wabash	3	14		M.		
To C. Belt	3	18		M.		
To Wisc. Cent.	"	"		M.		
To Gt. North.	3	22		M.		
To C. St. P. M. & O.	3	23		M.		
To Gt. North.	3	25		M.		
To Wisc. Cent.	3	28		M.		
To Gt. North.	3	28		M.		
To M. & W.	3	29		M.		
To Gt. North.				M.		
To Wisc. Cent.	3	31		M.		
To E. J. & E.	4	3		M.		
Del'd to N. Y. C. & St. L.	4	14				

283 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6–5–1905.

DEAR SIR: Below please find movements of N. Y. C. Car numbered 11645 from Weehawken to Victoria, B. C.

C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.		L. OR E. TIME.	TRAIN.	CON.
Rec'd from				M—To Erie	6	22	
From W'kn.	3	12	04	M—P. & L. E.	6	23	
To Ogdensburgh ...	3	15		M—Erie	7	3	
To C. P.	3	15		M—L. S. & M. S.	—	—	
To N. Y. C.	4	1		M—C. M. & St. P.	7	13	
To C. North.	4	26		M—L. S. & M. S.	7	21	
To M. C.	4	26		M—C. R. & I. P.	7	24	
To W. & L. E.	5	3		M—C. T. Transfer	7	25	
To C. H. & D.	5	3		M—C. R. & I.	8	23	
To C. & O.	5	6		M—L. S. & M. S.	—	—	
To C. H. & D.	5	27		M—P. R. R.	8	8	
To L. E. & W.	6	11		M—L. S. & M. S.	8	29	
To L. S. & M. S. ...	6	15		M			
To L. E. & W.	6	16		M			
To L. S. & M. S. ...	6	16					
Del'd to							

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6–5–1905.

DEAR SIR: Below please find movements of N. Y. C. Car numbered 46260 from Weehawken to Medicine Lodge, Kas.

C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from					M		
From W'kn.	3	15	04		M		
To Susp. Bridge	3	20			M		
To Wabash	3	21			M		
To C. Belt	3	24			M		
To A. T. & S. F.	3	24			M		
To M. C.	3	26			M		
To Chic. Junct.	3	26			M		
To Wabash	3	27			M		
To Chic. Jct.	3	29			M		
To Mich. Cent.	3	29			M		
To N. Y. C.	4	5			M		
To					M		
From					M		
To					M		
Del'd					M		

284 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6–5–1905.

DEAR SIR: Below please find movements of N. Y. C. Car numbered 64397 from Weehawken to Hamilton, Ont.

C. H. EWINGS, Car Acc't.

MOVEMENTS.	MONTH.	DAY.	YEAR.	TIME.	L. OR E. TRAIN.	CON.
Rec'd from				M. L. S. & M. S.		
From W'kn.	3	17	04	M. C. N. W.	6	14
To Ogdensburgh	3	21		M. L. S. & M. S.	6	21
To C. P.	3	21		M. E. J. & E.	6	23
To D. S. S. & A.	3	25		M. L. S. & M. S.	6	29
To M. C.	5	3		M. L. V.	7	2
To G. T.	5	12		M. W. & N. B.	7	5
To M. C.	5	17		M. P. & R.	7	16
To L. S. & M. S.	5	22		M. N. Y. C.	7	18
To M. C.	5	23		M.		
To L. S. & M. S.	5	23		M.		
To M. C.	5	27		M.		
To L. S. & M. S.	5	28		M.		
To Erie	6	1		M.		
To P. & L. E.	6	2				
Del'd to Erie	6	10				

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6–5–1905.

DEAR SIR: Below please find movements of N. Y. C. Car numbered 24241 from Weehawken to Winnipeg.

C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from					M		
From W'kn.	3	18	04		M		
To Ogdensburgh	3	22			M		
To C. P.	3	25			M		
To N. Y. C.	4	5			M		
From					M		
To					M		
From					M		
To					M		
From					M		
To					M		
From					M		
To					M		
From					M		
To					M		
Del'd to							

285 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6–5–1905.

DEAR SIR: Below please find movements of N. Y. C. Car numbered 64887 from Weehawken to Minneapolis.

C. H. EWINGS, Car Acc't.

MOVEMENTS.	MONTH.	DAY. DATE.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from							
From W'kn.	3	21	04		M		
To Ogdensburgh	3	25			M		
To C. P.	3	26			M		
To N. Y. C.	4	11			M		
From					M		
To					M		
From					M		
To					M		
From					M		
To					M		
From					M		
To					M		
From					M		
To					M		
Del'd to					M		

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6–5–1905.

DEAR SIR: Below please find movements of N. Y. C. Car numbered 65224 from Weehawken to Duluth.

C. H. EWINGS, Car Acc't.

MOVEMENTS.	MONTH.	DAY. DATE.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from							
From W'kn.	3	27	04		M		
To Ogdensburgh	3	31			M		
To C. P.	4	2			M		
To Hull Electric Co.	4	9			M		
To C. P.	4	2			M		
To N. Y. C.	4	22			M		
From					M		
To					M		
From					M		
To					M		
From					M		
To					M		
From					M		
To					M		
Del'd to					M		

286 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK, upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Relator,

against

OTTO KELSEY, as Comptroller of the State of New York, Respondent.

Stipulation under Sections 3301 *and* 1353 *of the Code of Civil Procedure.*

It is hereby stipulated, under Section 3301 of the Code of Civil Procedure, that the foregoing are true copies of the petition for writ of certiorari, order of issuance of writ, writ, and return to writ, and certification thereof, as required by Section 1353 of the Code of Civil Procedure, is hereby waived.

Dated New York, October 21, 1905.

IRA A. PLACE,
Attorney for Relator.

JULIUS M. MAYER,
Attorney-General,
Attorney for Respondent.

287 *Order of Appellate Division.*

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department of said State, at the Appellate Division Court Room, in the City of Albany, commencing on the 14th day of November, 1905.

Present: Hon. Charles E. Parker, Presiding Justice. Walter Lloyd Smith, Emory A. Chase, Alden Chester, John M. Kellogg, Associate Justices.

THE PEOPLE OF THE STATE OF NEW YORK, upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Relator,

vs.

OTTO KELSEY, as Comptroller of the State of New York, Respondent.

Tax of 1902.

This case having been brought on for hearing and argument upon the writ of certiorari and return and the papers upon which the writ was granted and having been submitted on printed brief and argu-
288 ment by Ira A. Place, Esq., of counsel for the relator, and by Horace McGuire, Esq., Deputy Attorney General, of counsel for the respondent,

Now, on motion of Julius M. Mayer, Attorney General, attorney for the respondent,

It is ordered that the determination of the Comptroller be and the same hereby is unanimously confirmed, with fifty dollars costs and disbursements.

JOSEPH H. HOLLANDS, *Clerk.*

[L. S.] A copy.
JOSEPH H. HOLLANDS.

SIR: Take notice, that the within is a copy of an order duly filed and entered in the office of the Clerk of Albany County on the 5th day of December, 1905.

Yours, etc.,

JULIUS M. MAYER,
Attorney General, Attorney for Respondent.

To Ira A. Place, Attorney for Relator.

289 *Affidavit of No Opinion.*

Supreme Court, Appellate Division—Third Department.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Relator,

against

OTTO KELSEY, as Comptroller of the State of New York, Respondent.

Tax of 1902.

STATE AND COUNTY OF NEW YORK, *ss:*

THOMAS EMERY, being duly sworn, says: That he is an attorney and counselor at law, and associate counsel for the relator The New York Central and Hudson River Railroad Company in the above-entitled action.

That no opinion was handed down by the Appellate Division herein.

THOMAS EMERY.

Sworn to before me this 6th day of December, 1905.

GEO. T. BROWN,
Notary Public, Westchester County.

Certificate filed in New York County.

290 *Relator's Notice of Appeal to Court of Appeals.*

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Relator,

against

OTTO KELSEY, as Comptroller of the State of New York, Respondent.

Notice of Appeal to Court of Appeals.

Tax of 1902.

SIRS: Please take notice that the relator in the above-entitled action hereby appeals to the Court of Appeals from the order of the Appellate Division of the Supreme Court, Third Department, entered herein in the office of the Clerk of the County of Albany, on the 5th day of December, 1905, and from each and every part of said order.

Dated New York, December 5th, 1905.

Yours, &c.,

IRA A. PLACE,

Attorney for Relator, Room 417 Grand Central Station, Borough of Manhattan, New York City, N. Y.

To Julius M. Mayer, Esq., Attorney for Respondent, Capitol, Albany, N. Y., and Clerk of the County of Albany, Albany, N. Y.

291 *Stipulation.*

In the Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant,

against

OTTO KELSEY, as Comptroller of the State of New York, Respondent.

Stipulation Under Sections 3301 and 1353 of the Code of Civil Procedure.

Tax of 1902.

It is hereby stipulated, under Section 3301 of the Code of Civil Procedure, that the foregoing are true copies of the notice of appeal, the order appealed from and the papers upon which the Court below acted in making said order, on file in the office of the Clerk of Albany County, and certification thereof, as required by Section 1353 of the Code of Civil Procedure, is hereby waived.

Dated Borough of Manhattan, New York City, December 6th, 1905.

IRA A. PLACE,

Attorney for Appellant.

JULIUS M. MAYER,

Attorney-General, Attorney for Respondent.

292 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, held at the capitol in the city of Albany, on the 23rd day of January, in the year of our Lord one thousand nine hundred and six before the judges of said court.

Witness the Honorable Edgar M. Cullen, chief judge presiding.
W. H. SHANKLAND, *Clerk.*

Amended Remittitur, January 31st, 1906.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant,

against

OTTO KELSEY, as Comptroller of the State of New York, Respondent.

Tax of 1902.

Be it remembered, that on the 15th day of December in the year of our Lord one thousand nine hundred and five, The New York Central and Hudson River Railroad Company, the appellant in this proceeding, came here into the Court of Appeals, by Ira A. Place, its attorney, and filed in the said court a notice of appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department, and Otto Kelsey, as Comptroller of the State of New York, the respondent in said proceeding, afterwards appeared in said Court of Appeals, by Julius M. Mayer, Attorney-General and attorney for said respondent, which said notice of appeal and the return thereto filed as aforesaid, are hereunto annexed.

Whereupon the said cause having been submitted to the
293 said Court of Appeals upon the printed briefs of counsel on behalf of the said respective parties, and after due deliberation thereon, the court did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from in this proceeding be and the same hereby is in all things affirmed with costs. The relator having contended herein that the statute if it purport to authorize the said tax, and the authority exercised under the Statute in and by the imposition and exaction of the said tax are and each thereof is violative of the Constitution of the United States in the several particulars following; the court hold and adjudge that the statute under and in pursuance of which the tax herein complained of is imposed and exacted does not, and the authority exercised under this Statute in and by the imposition and exaction of the said tax does not, (1) offend against the commerce clause Article 1 Section 8 of the Constitution of the United States; (2) nor contravene the provisions of Article 1 Section 10 thereof forbidding impairment of the

obligations of contracts; (3) nor offend against Article 4 Section 1 thereof requiring that full faith and credit shall be given in each State to the public acts of every other State; (4) nor offend against the provisions of the fourteenth amendment thereof forbidding the State to deprive any person of property without due process of law, and forbidding the State to deny to any person within its jurisdiction the equal protection of the laws.

And it was further ordered that the record aforesaid and the proceedings in this court be remitted to the said Supreme Court, there to be proceeded upon according to law.

Whereupon it is considered that the said order be in all things affirmed with costs as aforesaid and stand in full force strength and effect.

294 And hereupon as well the notice of appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the justices thereof &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office.

ALBANY, *January* 31*st*, 1906.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said proceeding in the Court of Appeals, with the papers originally filed therein and attached thereto.

[Seal Court of Appeals State of New York.]

W. H. SHANKLAND, *Clerk.*

295 & 296 *Memorandum.*

Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of The New York Central and Hudson River Railroad Company, Appellant,

vs.

OTTO KELSEY, as Comptroller of the State of New York, Respondent.

Argued January 9th, 1906; decided January 23, 1906.

Ira A. Place, for appellant.
Horace McGuire, Deputy Atty. General, for respondent.

Three appeals from determinations of the Appellate Division, third department, which unanimously affirmed the determinations

of the Comptroller of the State of New York in assessing the relator for its annual franchise tax for the years 1902, 1903 and 1904.

The orders in all three cases affirmed, with costs.

No opinion.

Concur: Cullen, Ch. J., O'Brien, Haight, Vann, Werner, Willard Bartlett and Hiscock, JJ.

297 [Endorsed] In the Court of Appeals of the State of New York. The People of the State of New York, Upon the Relation of The New York Central and Hudson River Railroad Company, Appellant, *vs.* Otto Kelsey, as Comptroller of the State of New York, Respondent. Memorandum. Tax of 1902.

298 *Assignment of Errors.*

In the Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of The New York Central and Hudson River Railroad Company, Plaintiffs in Error,

against

OTTO KELSEY, as Comptroller of the State of New York, Defendant in Error.

(Tax of 1902.)

To the Honorable Justices of the Supreme Court of the United States:

Come now the said petitioners, plaintiffs in error, and respectfully show to the Court that there is in the said record and proceedings manifest error upon which they will rely in and for their prosecution of the writ of error in the above entitled cause, to wit:

I. That the said Supreme Court of the State of New York erred in rendering, and the said Court of Appeals of the State of New York erred in affirming the final order and judgment wherein and whereby the provisions of section 182 of the Tax Law of the State of New York, and the authority exercised thereunder by the Comptroller of the State of New York, were held valid in and for franchise taxation of and upon the basis of the capital of the said relator invested and employed in the average number of its passenger, freight, mail, baggage and express cars which were in obedience to laws of the United States and in due course of business delivered by relator to

299 and employed and used by other common carrier railroad corporations outside of the State of New York in the through carriage of persons and property starting or consigned from the State of New York, Massachusetts, New Jersey and Pennsylvania, respectively, and destined to other states, and vice versa, and in transportation of persons and property between points in respective states other than and over routes wholly outside of the State of New York, and that such franchise tax did not offend against the commerce clause, Article 1, Section 8 of the Constitution of the United States.

II. That the said Courts, respectively, erred in holding and deciding the said statute valid authority of and for franchise taxation upon the basis of the capital of the said relator invested and employed in the average number of its passenger, freight, baggage, mail and express cars, which in obedience to requirements of the United States statutes, and in the due process of business were transferred and surrendered by said relator to the possession of and used successively and interchangeably by other common carrier railroad corporations outside of the State of New York in the through carrying of persons and property between points in respective states other than New York State, and over routes outside of that state, all under authority of and in the exercise of franchises granted to them respectively by respective states other than the State of New York, and that the franchise tax thus computed and imposed did not impair the obligations of the contracts, arising upon, inhering in and pertaining to the grant, acceptance and use of the respective franchises whereunder the said cars of relator were thus operated and used outside of the State of New York by common carrier railroad corporations foreign to said
300 State of New York, and hence was not repugnant to Article 1, Section 10 of the Constitution of the United States.

III. That the said Courts, respectively, erred in holding and deciding the said statute valid authority of and for franchise taxation upon the basis of the capital of the said relator invested and employed in the average number of its passenger, freight, baggage, mail and express cars, which in the course of transportation business and in obedience to the requirements of the United States statutes, were by the said relator delivered to corporations foreign to the State of New York, and by such foreign corporations employed and used upon railroads operated by them respectively, in respective states other than New York State in the through carrying of persons and property starting or consigned from points in New York, Massachusetts, New Jersey or Pennsylvania, respectively, and destined to points outside of such respective state, and vice versa, and between points foreign to said several states via and over lines of railroad situate without the State of New York, all in the exercise of and under the authority of franchises granted by the respective states wherein the said operations were so carried on and conducted, and that such franchise tax did not impair the obligations of the contracts pertaining to such use of relator's cars by other corporations, and hence was not repugnant to Article 1, Section 10 of the Constitution of the United States.

IV. That the said Courts, respectively, erred in holding and deciding the said statute valid authority of and for and the exercise thereunder of said authority the valid imposition of franchise taxation in and by the State of New York upon the basis of the capital of relator invested and employed in the average number of
301 its cars which, in obedience to the requirements of the statutes of the United States, were delivered by relator to transportation corporations foreign to the State of New York, and operated and used by them wholly within states other than New York State, under authority of, and in the exercise of franchises granted by such other

states, respectively, to corporations created by them, and that the said statute and the said tax imposed under its authority, did not operate to deprive relator of its property or property rights without due process of law, and did not deprive relator of the equal protection of the laws and hence did not contravene the provisions of the fourteenth amendment to the Constitution of the United States.

V. That the said Courts, respectively, erred in holding and deciding that franchise taxation prescribed by, and imposed by the said Comptroller of the State of New York under the supposed authority of said statute, upon the basis of relator's capital invested in the average number of its cars by it operated and used in the States of Massachusetts, New Jersey and Pennsylvania, respectively, in the transportation of persons and property between points within either of the said respective states, and between points within and points without such respective State, and between points of starting or shipment and points of destination without via and over routes in part within one or more of the said respective states, all under authority of and in the exercise of franchises granted by those states, respectively, to corporations created thereby and domiciled therein, and by the latter leased to the said relator, all subject unto the regulation of and under the authority and protection of the public acts of such respective state, did not burden or regulate interstate or foreign commerce, and hence did not offend against or contravene the provisions of
302 the commerce clause, Article 1, Section 8 of the Constitution of the United States; did not impair the obligations of contracts arising upon or inhering such obedience to the commerce laws of the United States, and therein did not contravene Article 1, Section 10 of the Constitution of the United States; and did not deny or refuse full faith and credit to the public acts of such other state and therein did not contravene Article 4, Section 1 of the Constitution of the United States.

VI. That the said Courts, respectively, erred in holding and deciding the said statute valid authority of and for franchise taxation in and by the State of New York upon the basis of the capital of relator invested and employed in the average number of its cars operated and used by it in the States of Massachusetts, New Jersey and Pennsylvania in the exercise of franchises granted by those states, respectively, and leased or remised by the grantees thereof to the said relator, and exercised by it in the carrying of commerce between points respectively within, and between points within and points without those respective states, and that therein and thereby the said statute did not impose burden upon or regulation of interstate and foreign commerce and did not impair the obligations of contracts pertaining to interstate and foreign commerce, and hence did not offend against the provisions of either Article 1, Section 8, or Article 1, Section 10 of the Constitution of the United States.

VII. That the said Court, respectively, erred in holding and deciding that franchise taxation imposed by the said Comptroller of the State of New York under the supposed authority of said statute, upon the basis of the capital of said relator invested
303 in the average number of its cars by it operated and used in the States of Massachusetts, New Jersey and Pennsylvania,

respectively, in the exercise of franchise granted by those states, respectively, to corporations created thereby and domiciled therein, and by them leased to relator and by it exercised in commerce local to said respective states, as also in commerce between those respective states and other states, did not impair the obligations of the contracts inhering in, arising upon and pertaining to the grant, acceptance and use of the franchises granted by the said respective states, within their domain, respectively, and hence did not therein offend against the provisions of Article 1, Section 10 of the Constitution of the United States.

VIII. That the said Courts, respectively, erred in holding and deciding the said statute valid authority of and for franchise taxation upon the basis of the capital of the said relator invested and employed in the average number of its cars used wholly outside of the State of New York, in the operation of railroads situate in other states, owned by corporations created by and domiciled within such other respective states, and leased to and operated by the said relator under authority of the franchises of its said respective lessors, granted to them by the said states, respectively, and that such franchise tax did not impair the obligations of the said contracts of lease, and hence was not therein repugnant to Article 1, Section 10 of the Constitution of the United States.

IX. That the said Courts, respectively, erred in holding and deciding the said statute valid authority of and for and the exercise thereunder of said authority the valid imposition of franchise taxation upon the basis of the capital of the said relator invested and employed in the average number of its passenger, freight,
304 baggage, mail and express cars employed and used by relator in the States of Massachusetts, New Jersey and Pennsylvania, respectively, upon lines of railroad situate in and built and owned by corporations chartered by and domiciled in said respective states, and leased by such corporations to and operated by the said relator, in the carrying of state and interstate commerce under and subject unto the franchise granted and regulation prescribed by such respective state wherein the said road is situate, and that such franchise tax did not transcend the territory and power of the jurisdiction of the State of New York and of its said Comptroller and did not deprive relator of its property or property rights without due process of law, and did not deny to relator the equal protection of the laws, and hence did not therein contravene the fourteenth amendment of the Constitution of the United States.

X. That the said Courts, respectively, erred in holding and deciding the said statute of the State of New York to be valid authority for, and the said authority of the Comptroller of the State of New York exercised thereunder to constitute valid imposition of, the said franchise tax imposed and computed upon the basis of the capital of the said relator invested and employed in the average number of its cars, which, having in obedience to the requirements of the laws of the United States passed out of the State of New York and out of the possession, custody and control of the said relator, were operated and used by railroad corporations created by other states upon their railroads there situate, under authority of franchises granted by such

other states, respectively, in common carrier transportation local to said respective states and between those and other states, and that such franchise tax thus computed and imposed did not con-
305 stitute a burden upon or regulation of commerce among the several states, and did not impair the obligations of the contracts under which in obedience to the laws of the United States the said relator transferred and surrendered, and the said respective foreign corporations in turn directly or remotely acquired possession and custody of and used the said cars of said relator, and did not impair the obligations of the contracts inhering in, arising upon and incident to the grant, acceptance and use in such other states of the franchises granted by them, respectively, and did not derogate from the dignity of such other respective states or refuse full faith and credit to the public acts thereof, or otherwise transcend the territory or power of the jurisdiction of the State of New York or of its said Comptroller, and hence that the said franchise tax thus computed and imposed did not offend against and was not violative of or repugnant to either Article 1, Section 8, or Article 1, Section 10, Article 4, Section 1, or the fourteenth amendment of the Constitution of the United States.

XI. That the said Courts, respectively, erred in holding and deciding the said statute of the State of New York to be valid authority for, and the said authority of the Comptroller of the State of New York exercised thereunder to constitute valid imposition of the said franchise tax computed and imposed upon the basis of the capital of the said relator invested and employed in the average number of its cars operated and used in the States of Massachusetts, New Jersey and Pennsylvania, respectively, upon lines of railroad situate therein, built, maintained and operated under authority of franchises granted by those respective states to and accepted by corporations created thereby, and domiciled therein, and under leases or grants of trackage rights of railroad and accompanying
306 franchise demised or let by the said owning corporations to the said relator, and thus operated and used in and about common carrier transportation local to the said states of Massachusetts, New Jersey and Pennsylvania, respectively, and between those respective states and other states of the United States and dominions foreign to the United States, and that such franchise tax thus computed and imposed did not constitute a burden upon or regulation of commerce among the several states or foreign commerce, or commerce within and domestic to such respective state, and did not impair the obligations of the contracts inhering in, arising upon and incident to the grant, acceptance and use in such respective States of Massachusetts, New Jersey and Pennsylvania of the franchises granted by them respectively, or of the contracts of lease and agreements of and for trackage rights whereby and whereunder the said owning corporations granted, demised and let the said property and property rights and franchises to relator and relator thus operated in the said respective states under authority thereof and of said franchises, and did not derogate from the dignity of such respective state or deny or refuse full faith and credit to the public acts of such other respective state, or thus or otherwise transcend the

territory or power of the jurisdiction of the State of New York or of its said Comptroller, and hence that the said franchise tax thus computed and imposed did not contravene or offend against and was not violative of or repugnant to either Article 1, Section 8, or Article 1, Section 10, Article 4, Section 1, or the fourteenth amendment of the Constitution of the United States.

XII. That the said Courts, respectively, erred in so holding and deciding as therein and thereby to uphold and sustain the
307 validity of the said statutory provisions and of the authority of the said Comptroller of the State of New York exercised thereunder in the said computation and imposition of the said franchise tax as not constituting a burden upon or regulation of commerce domestic to and within states other than the State of New York, as not constituting a burden upon or regulation of commerce among the several states or with foreign countries, as not impairing the obligations of contracts arising upon and pertaining to commerce within and domestic to states other than the State of New York, as not impairing the obligations of contracts arising upon or pertaining to commerce among the several states and with foreign countries, as not impairing the obligations of contracts arising upon and pertaining to the grant and acceptance and lease of franchises by and the exercise and use thereof within states other than the State of New York, as not derogatory to the dignity of a sister state, as not denying full faith and credit to the public acts of such other state, as not transcending the territory or power of the jurisdiction of the State of New York or of its said Comptroller, and as not depriving the said relator of its property or property rights without due process of law, and as not depriving relator of the equal protection of the laws, and hence denying to the said relator the relief, order and decree herein prayed for, and in rendering judgment against them for costs and disbursements in the said cause and proceeding.

XIII. That the said Courts, respectively, erred in holding and deciding in favor of the validity of the said statute of the State of New York, and the authority of the said Comptroller of the State
308 of New York by him exercised thereunder, and consequent thereupon that the said petitioners, plaintiffs in error, were disentitled to have and maintain their said cause and proceeding and to have the relief, order and decree therein and thereby prayed for.

XIV. That the said Courts, respectively, erred in holding and deciding in favor of the validity of the said statute of the State of New York and of the said authority exercised thereunder, whereby the said franchise tax was in manner aforesaid computed and imposed, as not repugnant to the Constitution of the United States, and consequent thereupon denying to said relator the relief, order and decree prayed for in its complaint in said cause.

XV. That the said Courts, respectively, erred in that their said respective final order and judgment were for and in favor of the said respondent, defendant in error, as Comptroller of the State of New York, when the same should have been for and in favor of the said petitioners.

The said petitioners, plaintiffs in error, pray judgment that the

said final order and judgment aforesaid be in all things reversed, set aside and held for naught, and the said relator may be restored to all things which it has lost by occasion thereof.

IRA A. PLACE,
Attorney for Plaintiffs in Error.

THOMAS EMERY,
Of Counsel.

309 [Endorsed:] United States Supreme Court. The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, Plaintiffs in Error, against Otto Kelsey, as Comptroller of the State of New York, Defendant in Error. Assignment of Errors. (Tax of 1902.) Ira A. Place, Attorney for Plaintiffs in Error, Grand Central Station, Borough of Manhattan, New York City, N. Y.

310 *Petition for Writ of Error to the Court of Appeals of the State of New York.*

In the Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK, upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Plaintiffs in Error,

against

OTTO KELSEY, as Comptroller of the State of New York, Defendant in Error.

(Tax of 1902.)

To the Honorable Justices of the Supreme Court of the United States.

Come now the said petitioners The People of the State of New York upon the relation of The New York Central and Hudson River Railroad Company by their attorney, and as and by way of complaint of and against the sait Otto Kelsey, as Comptroller of the State of New York, respondent, respectfully show to the Court:

That the said relator, The New York Central and Hudson River Railroad Company, was during all of the times mentioned in the record herein and is a domestic corporation of the State of New York, organized under the laws of and domiciled within that state, engaged in the business of a common carrier of persons and property between points respectively within that state, and between points respectively within either of the respective States of Massachusetts, New Jersey and Pennsylvania, and between points in either of the said respective states and points in either of the others thereof, and between
311 points in either of said states and points in other states and foreign countries, and between points in respective states other than the above, via and over routes extending through and over portions of one or more of the said respectively named states.

That by provision of the Tax Law of the State of New York, Section 180, the tax or license fee of and for domestic corporation organ-

ization, existence and capacity is imposed, exacted and paid once for all at the threshold of the vesting of corporate power; Section 182 thereof provides imposition of an annual franchise tax for and upon the exercise of domestic corporation franchises to be computed as therein provided upon the basis of the amount of corporate capital employed in said state within the tax year; and, Section 184 thereof provides imposition of an additional annual franchise tax to be computed upon the basis of the amount of corporate gross earnings therein within the tax year.

That during the year ending October 31, 1902, for and in respect of which the tax here in question was imposed and exacted, the said relator carried on its said business of a common carrier of persons and property in and by the operation of engines, cars and trains upon and over its owned and leased lines of railroad and lines of railroad upon and over which it had trackage rights, respectively, within the State of New York, and upon and over leased lines of railroad and lines of railroad upon and over which it had trackage rights, respectively, within the respective States of Massachusetts, New Jersey and Pensylvania, upon all whereof it thus carried persons and property locally between points within either of the respective states wherein portions of its operated lines of railroad were situated,
312 and between points in either of those respective states and points in other states.

That in and about the carrying on of said transportation business by the said relator large numbers of its cars, though composed of frequently and constantly changing individual cars, passed into or out of the said respective States of New York, Massachusetts, New Jersey and Pennsylvania in such wise that at all times a large average number, to wit, many hundreds of the cars of said relator were continuously situate, employed and operated in the States of Massachusetts, New Jersey and Pennsylvania, respectively, upon and over railroads there situate, and in so doing were thus operated in the right of and under authority of the franchises in that behalf granted by those respective states and subject unto the burdens imposed and regulations prescribed in and by the public acts, laws, rules and ordinances of the respective state, and political subdivision thereof, wherein the said portion of road was situate and the said transportation service performed.

That the major part of the said relator's said transportation business consisted of such transportation by it upon and over portions of its said operated lines of road of so much of through carriage of persons and property starting or consigned from points outside of some one of the respective States of New York, Massachusetts, New Jersey and Pennsylvania and destined to points within some one of said respective states, or vice versa, and persons and property starting or consigned from points respectively without either of said states, passing en route through some one or more thereof, and destined to points respectively without either thereof.

That inasmuch as the said transportation service thus performed and rendered by the said relator consisted of operations within
313 the said States of Massachusetts, New Jersey and Pennsylvania respectively, they consisted of and inhered in the exercise

of franchises granted by those states respectively to corporations created by and domiciled within the said states, respectively, which were thus exercised by relator under and in pursuance of contracts of and for leases of, and contracts of and for trackage rights upon and over railroads there situate, together with the franchise to maintain and operate the same, granted, remised and accorded by the said corporations created by said respective states to the said relator, and exercised and enjoyed by the said relator in and under authority of the rights of its respective lessors and under and in pursuance of and subject unto the burdens imposed and regulations prescribed by the public acts and laws of the said States of Massachusetts, New Jersey and Pennsylvania respectively.

That in and by the exercise and performance of the functions thus employed by the said relator in the respective States of Massachusetts, New Jersey and Pennsylvania the only such function which it thus exercised under authority of the State of New York was that of its corporate existence, capacity and powers, the tax whereon or wherefor is no part of the tax here in question.

That the said franchise thus exercised by the said relator in the respective States of Massachusetts, New Jersey and Pennsylvania in and about and in respect of the there operation of its trains and transportation of persons and property were solely those granted and accorded by and under authority of the said respective states wherein the said operations were carried on and conducted, and were altogether and only subject unto regulations prescribed and pro-
314 mulgated by authority of those respective states and by authority of the United States, and not at all by authority of the State of New York.

That if and so far as it was within the province and power of the State, as distinguished from the United States, to impose or exact burdens upon or to prescribe regulations for and concerning the exercise by relator of the said franchises of railroad maintenance, train operation and transportation of persons and property, the province and power thereof solely inhered in and pertained to the said respective States of Massachusetts, New Jersey or Pennsylvania wherein the said respective railroad was situate and the said franchises were exercised, and not in or to the said State of New York.

That in and about the said relator's train operations and transportation of persons and property upon and over its said operated lines of railroad in the said respective States of New York, Massachusetts, New Jersey and Pennsylvania, respectively, in obedience to the requirements of the laws of the United States respecting through transportation from one state to another of carload commodities without reloading or breaking of bulk, and otherwise in conformity with the methods generally observed and followed by common carrier railroad transportation companies within the United States, in the time last preceding and within the said tax year, large numbers of relator's cars of various kinds were from day to day transferred and delivered from relator, and its said operated lines of railroad, in the respective States of New York, Massachusetts, New Jersey and Pennsylvania, to, and upon the railroads of and operated by, other common carrier

railroad transportation companies foreign to and outside of the State of New York, whereby a large average number of relator's cars, consisting of more or less frequently changing individual cars,
315 were continuously and at [illegible] and all times out of the State of New York, and out of the possession, custody and use of the said relator, and in the meantime transferred and delivered, more or less frequently from one to another common carrier railroad transportation corporation, and by them employed outside of the State of New York in and about their mutual and respective transportation business, foreign to and entirely dissociated from the business of the said relator, and in such wise as rendered it impossible for the relator to know, be informed or make proof, what, if any, of the said cars, and the extent to which all or any thereof were employed in transportation business solely within or domestic to any state, or in transportation business between or among the several states, or between the United States and countries or dominions foreign thereto; all of which said employment was under authority of and in the exercise of franchises respectively granted by the respective State in which the respective portion of transportation service was performed and carried on, and none whereof were granted by the State of New York.

That all and singular the service performed and business carried on and conducted by the means and in the use of relator's said cars, as well in the instances of operation thereof by the said foreign corporations as also in the instances of the operation thereof by relator, as and when carried on and conducted within the bounds of either such respective state other than New York were thus rendered, carried on and conducted under and subject unto the public regulation in that behalf prescribed, and under the authority and protection in that behalf provided and afforded in and by and in pursuance of the public acts of the respective state within whose territorial bounds
316 each respective portion thereof transpired and occurred, save and except only as and wherein the said service and business were subject unto and governed by the constitution, laws and administration of the United States.

That subject only unto such exception of Federal control each such State other than the State of New York had and exercised the exclusive province of prescribing in and by its public acts all and singular the burdens and regulations which the portions of the said service and business conducted within its territorial limits should be subject unto; and it was not within the province of the State of New York to impose other or further burden or regulation upon or concerning either intra-state, interstate or foreign commerce or any part thereof carried on or conducted within the bounds of such other state even though such service was performed or such business was carried on and conducted by relator corporation created by and having its domicil in the State of New York, for that any and either such imposition of regulation or burden contravened the provisions of the Constitution of the United States in that it denied full faith and credit to the public acts of such other state; deprived relator of the equal protection of the laws of the State of New York; deprived relator of the equal protection of the laws of each such other State; oppressed by

local commerce of and thus and otherwise derogated from and inveighed against the dignity and sovereignty of each such other State; transcended the power of the jurisdiction of the State of New York, in and by imposition of its tax burdens upon property, business and avocation respectively having their *situs* outside the State of New York and therein constituted the taking of the property of relator without due process of law, and, oppressed the privilege, occu-
317 pation and business of interstate and foreign commerce in manner aforesaid exercised, carried on and conducted by relator in each of the respective States other than New York in which its said cars were as aforesaid operated and employed.

That the capital of the said relator invested and employed in the average number of the cars of the relator in manner aforesaid absent from and employed outside of the State of New York in and during the franchise tax year ending October 31, 1902, was in excess of the sum of $16,646,391.06, which said sum stood in such relation to the meantime total capital of said relator that in and by inclusion thereof as subject unto the franchise tax to be computed upon the basis of the relator's capital employed within the State of New York, the said franchise tax was augmented and enlarged in and by the sum of $13,909.28.

That the said Comptroller of the State of New York in and about the imposition and laying of the said franchise tax upon and against the said relator to be computed upon the basis of the capital of the said relator employed within the State of New York during the said tax year, and the said respective courts in and about their respective final orders and judgments of affirmance of the said tax, imposed and sustained the same computed upon the basis of and including all of the cars of the said relator, the large average numbers whereof were in manner aforesaid absent from and employed in state and interstate and foreign commerce outside of the State of New York.

And the said petitioners further respectfully show unto the Court and complain that in the said record and proceedings had in the above entitled action (Taxes of A. D. 1902), and also in the rendition of the final order and judgment in the same cause, in the Supreme Court of the State of New York, sitting in Albany County,
318 Third Judicial Department, at the Appellate Division, November Term thereof, A. D. 1905, to wit: November 14, 1905, as also in the final order and judgment of the Court of Appeals of the State of New York, to which last mentioned court the said cause was appealed by said petitioners, being the highest court of law and equity in said state, and the highest such court in which a decision could be had in such cause, to wit; on January 23d, A. D. 1906, affirming on appeal the said final order and judgment of the Supreme Court of the State of New York, in the said cause between the said The People of the State of New York upon the relation of The New York Central and Hudson River Railroad Company, petitioners and plaintiffs in error, and the said Otto Kelsey, as Comptroller of the State of New York, respondent, and defendant in error, in each which Supreme Court and Court of Appeals, was drawn in question the validity of a statute of said state, and the validity of an authority exercised by the

said Comptroller under said state, on the grounds that (1) they constituted a burden upon and regulation of commerce among the several states as carried on and conducted by the said relator and were thus repugnant to the commerce clause Article 1, Section 8, of the Constitution of the United States; (2) they impair the obligations of contracts of and with the said relator and were thus repugnant to Article 1, Section 10 of the Constitution of the United States; (3) they deprive the said relator of its property and property rights without due process of law and deny to it the equal protection of the laws, and were thus repugnant to the provisions of the fourteenth amendment of the Constitution of the United States, and (4) they deny and refuse to give full faith and credit to the public acts of such other respective states wherein relator's said cars were as aforesaid employed,

319 and were therein violative of Article 4, Section 1, of the Constitution of the United States, and the decision, final order and judgment of each thereof, the said Supreme Court and the said Court of Appeals, was in favor of such their validity; and that the said decision, final order and judgment of affirmance of the said Court of Appeals of the State of New York, together with the record and proceedings in said cause now remain in the said Court of Appeals of the State of New York before the justices thereof; in all whereof manifest error hath happened to the prejudice and damage of the said relator, The New York Central and Hudson River Railroad Company.

Wherefore, the said The People of the State of New York upon the relation of The New York Central and Hudson River Railroad Company, petitioners and plaintiffs in error, pray for the allowance of a writ of error, and for such other and further orders and process as may cause the record and proceedings aforesaid, with all things concerning the same, to be sent to the Supreme Court of the United States, that upon final hearing hereof the said error be corrected, and such other and further proceeding be ordered and had as according to law should be done.

And your petitioners will ever pray.

Dated January 24th, 1906.

IRA A. PLACE,
Attorney for Petitioners, Plaintiffs in Error.

Room 417, Grand Central Station, Borough of Manhattan, New York City, N. Y.

THOMAS LINEY, *Of Counsel.*

320 STATE OF NEW YORK, *County of New York, ss:*

Edward L. Rossiter, being duly sworn, says, that he is an officer of The New York Central and Hudson River Railroad Company, the petitioner herein, to wit, the Treasurer thereof; that the foregoing petition is true to the best of his knowledge and belief.

E. L. ROSSITER.

Sworn to before me this 24th day of January, 1906.

GEO. T. BROWN,
Notary Public Westchester County.

Certificate filed in N. Y. County.

Allowed this 31st day of January, 1906.

EDGAR M. CULLEN,
Chief Judge of the Court of Appeals of the State of New York.

321 [Endorsed:] United States Supreme Court. The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, Plaintiffs in Error, *against* Otto Kelsey, as Comptroller of the State of New York, Defendant in Error. Petition for Writ of Error. (Tax of 1902.) Ira A. Place, Attorney for Plaintiffs in Error, Grand Central Station, Borough of Manhattan, New York City, N. Y.

322 United States Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant,
against
OTTO KELSEY, as Comptroller, etc., Respondent.

(Tax of 1902.)

Know all men by these presents, That we, The People of the State of New York *ex rel.* The New York Central and Hudson River Railroad Company, as principal, and the National Surety Company having an office and principal place of business at #346 Broadway, Borough of Manhattan, City of New York, as surety, are held and firmly bound unto Otto Kelsey, as Comptroller, etc., above-named, in the sum of Five hundred ($500.) Dollars to be paid to the said Otto Kelsey, as Comptroller, etc., his executors or administrators, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated the 24th day of January, 1906.

Whereas, the above-named Appellant has sued out a Writ of Error to the United States Supreme Court to reverse the judgment in the above entitled case by the Court of Appeals of the State of New York.

Now, therefore, the condition of this obligation is such that if the above-named Appellant shall prosecute said writ to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void otherwise to remain in full force and virtue.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
[CORPORATE SEAL.]
By W. H. NEWMAN, *President.*
Attest:
[L. S.] D. W. PARDEE, *Secretary.*

NATIONAL SURETY COMPANY,
By JOEL RATHBONE, *Res. Vice-President.*
Attest:
RICHARD U. MORIARTY, *Res. Asst.-Secretary.*

323 STATE OF NEW YORK, *County of New York, ss:*

On the 24th day of January in the year 1906, before me personally came William H. Newman, to me known, who being by me duly sworn did depose and say, that he resides in the City of New York; that he is the President of The New York Central and Hudson River Railroad Company, the corporation described in and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by authority of the Board of Directors of said Corporation, and that he signed his name thereto by like authority.

[SEAL.] ALBERT B. QUENCER,
Notary Public, N. Y. County, N. Y. (*No.* 1.)

324 STATE OF NEW YORK, *County of New York, ss:*

On this 24th day of Jan 1906, before me personally appeared Joel Rathbone. Res-Vice. President of the National Surety Company, with whom I am personally acquainted, who being by me duly sworn, said that he resides in the County of New York; that he is the Res-Vice. President of the National Surety Company, the corporation described in and which executed the within instrument; that he knows the corporate seal of said Company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company, and that he signed said instrument as Res-Vice. President of said Company by like authority; and that the liabilities of said Company do not exceed its assets, as ascertained in the manner provided in Section 3, Chapter 720 of New York Session Laws of 1893. And the said Joel Rathbone further said that he is acquainted with Richard U. Moriarty, and knows him to be the Res. Asst. Secretary of said Company; that the signature of the said Richard U. Moriarty, subscribed to the said instrument is in the genuine handwriting of the said Richard U. Moriarty, and was thereto subscribed by the like order of the said Board of Directors and in the presence of him, the said Joel Rathbone, Res-Vice. President.

MOLLIE SCHOENBRUN,
Notary Public for the County of N. Y., No. 347.

Certificate filed in Kings, Westchester, Richmond & Queens Counties.

Copy of By-law.

Be it Remembered, That at a regular meeting of the Board of Directors of the National Surety Company, duly called and held on the 6th day of February, 1900, a quorum being present, the following By-Law was adopted:

"ARTICLE XIII. SEC. 1.—*Signatures Required.* All bonds, recognizances, contracts of indemnity and other writings obligatory in the nature thereof, shall be signed by the President, the Vice-

"President, the Second Vice-President, a Resident Vice-President, or "an attorney in fact, and, except when signed by an attorney in "fact, shall have the seal of the Company affixed thereto, duly at- "tested by the Secretary, an Assistant Secretary or a Resident Assist- "ant Secretary. The Vice-President, Second Vice-President and "Resident Vice-Presidents shall each have authority to sign such in- "struments whether the President be absent or incapacitated or not; "and the Assistant Secretaries and Resident Assistant Secretaries "shall each have authority to seal and attest such instruments, "whether the Secretary be absent or incapacitated or not. All such "instruments executed as herein provided shall be as binding upon "the Company as if the same were signed by the President, duly "sealed and attested by the Secretary."

STATE OF NEW YORK, *County of New York, ss:*

I, Richard U. Moriarty, Res. Asst. Secretary of the National Surety Company, have compared the foregoing copy of By-Law with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original By-Law.

Given under my hand and seal of the Company this 24th day of Jan 1906.

[L. S.]

RICHARD U. MORIARTY,
Res. Ass't Secretary.

Approved by

EDGAR M. CULLEN,
Chief Judge of the Court of Appeals.

325 [Endorsed:] United States Supreme Court. The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, Plaintiffs in Error, *against* Otto Kelsey, as Comptroller of the State of New York. Copy Undertaking. (Tax of 1902.) Ira A. Place, Attorney for Plaintiffs in Error, Grand Central Station, Borough of Manhattan, New York City, N. Y.

326 The original of the foregoing supersedeas bond was lodged with the Clerk of the Court of Appeals of the State of New York, on February 2nd, 1906, and the following endorsement made thereon: Bond. Filed February 2nd, 1906—W. H. Shankland, Clerk of the Court of Appeals.

327 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of New York, possessors of the return and record in the acton in which The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company are Plaintiffs, and Otto Kelsey, as Comptroller of the State of New York, is Defendand, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea in the Court of Appeals of the State of New York, wherein final judgment upon return from the Supreme Court of the State of New York was rendered January 23d, 1906, that being the highest Court of law and equity of the said State in which a decision could be had in the suit or action between The People of the State of New York, upon the relation of The New York Central and Hudson River Ralroad Company, Plaintiffs in Error, and Otto Kelsey, as Comptroller of the State of New York, Defendant in Error, and which is now before you or some of you in said Court; wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity, a manifest error hath happened to the great damage of the said, The New York Central and Hudson River Railroad Company, as by its complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do

328 command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the said Supreme Court, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the first day of February in the year of our Lord one thousand nine hundred and six, and of our Independence the one hundred and thirtieth.

[Seal of the U. S. Circuit Court, Northern District N. Y.]

W. S. DOOLITTLE,
Clerk of the United States Circuit Court
for the Northern District of New York.

Allowed by
EDGAR M. CULLEN,
Chief Judge of the Court of Appeals
of the State of New York.

329 [Endorsed:] United States Supreme Court. The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company Plaintiffs in Error, against Otto Kelsey, as Comptroller of the State of New York, Defendant in Error. Writ of Error. (Tax of 1902.) Ira A. Place, Attorney for Plaintiffs in Error, Grand Central Station, Borough of Manhattan, New York City, N. Y.

330 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To Otto Kelsey, as Comptroller of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Court of Appeals of the State of New York wherein the People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 31- day of January in the year of our Lord one thousand nine hundred and six.

EDGAR M. CULLEN,
Chief Judge of the Court of Appeals of the State of New York.

331 [Endorsed:] United States Supreme Court. The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, Plaintiffs in Error, *against* Otto Kelsey, as Comptroller of the State of New York, Defendant in Error. Citation. (Tax of 1902.) Ira A. Place, Attorney for Plaintiffs in Error, Grand Central Station, Borough of Manhattan, New York City, N. Y. Due service of a copy of within citation is admitted this 6th day of February, 1906. Julius M. Mayer, Att'y for Def't in Error.

332 Court of Appeals of New York, on Appeal from the Appellate Division, Third Department.

THE PEOPLE OF THE STATE OF NEW YORK, upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Plaintiffs in Error,

vs.

OTTO KELSEY, as Comptroller of the State of New York.

(Tax of 1902.)

Papers on Appeal.

Ira A. Place, attorney for relator and appellant.
Julius M. Mayer, Attorney-General, attorney for respondent.

STATE OF NEW YORK:

Court of Appeals, Clerk's Office.

To the Judges of the United States Supreme Court:

The return of the judges of the Court of Appeals of the State of New York, in pursuance to the writ of error in the case of The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, appellant, *vs.* Otto Kelsey, as Comptroller of the State of New York, respondent, taxes of 1902, is contained in the papers and proceedings hereto attached.

In witness whereof I have hereunto set my hand and affixed my official seal at the city of Albany this 2nd day of February, 1906.

[Seal Court of Appeals, State of New York.]

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

Endorsed on cover: File No. 20,088. New York Court of Appeals. Term No. 586. The People of the State of New York upon the relation of The New York Central & Hudson River Railroad Company, Plaintiff in Error, *vs.* Otto Kelsey, as Comptroller of the State of New York. Filed February 7th, 1906. File No. 20,088.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 587.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

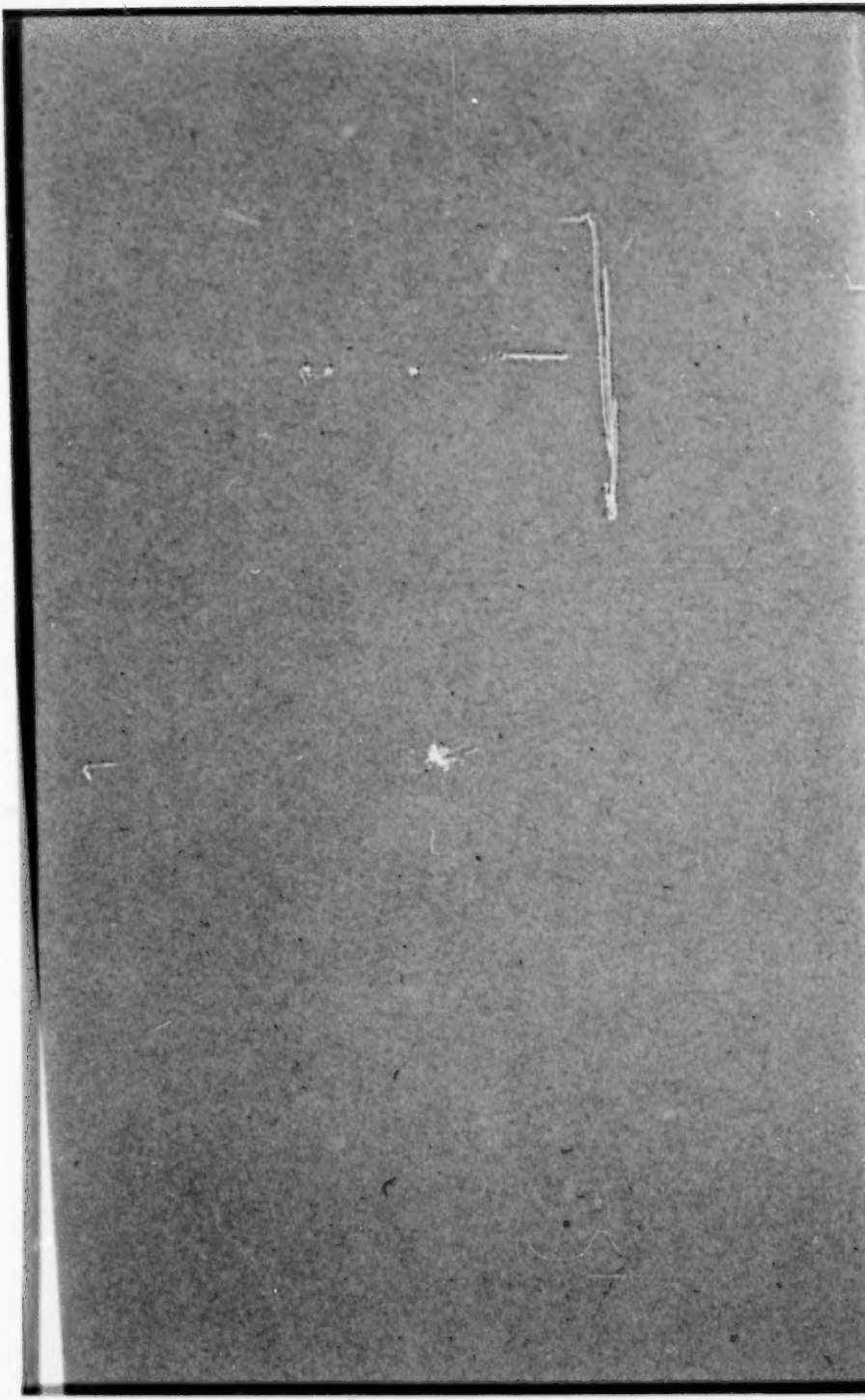
vs.

OTTO KELSEY, AS COMPTROLLER OF THE STATE OF NEW YORK.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

FILED FEBRUARY 7, 1906.

(20,089.)



(20,089.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 587.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

OTTO KELSEY, AS COMPTROLLER OF THE STATE OF NEW YORK.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

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In the Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

against

OTTO KELSEY, as Comptroller of the State of New York.

Papers on Appeal from Order.

Proceedings for 1903.

Ira A. Place, Attorney for Appellant, Grand Central Station, Borough of Manhattan, N. Y. City, N. Y.
Julius M. Mayer, Attorney-General, Attorney for Respondent, Capitol, Albany, N. Y.

1 *Notice of Application for an Order for a Writ of Certiorari and for Writ.*

Supreme Court, Albany County.

Tax of 1903.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

against

OTTO KELSEY, as Comptroller of the State of New York.

SIR: Please take notice that a motion will be made by and on behalf of The New York Central and Hudson River Railroad Company, at a Special Term of the Supreme Court in and for the County of Albany, to be held at the City Hall in the City of Albany, N. Y., on the 30th day of September, 1905, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order for a writ of certiorari, and also for a writ of certiorari, to be directed to you, to review the determination of the Comptroller of the State of New York, dated September 11, 1905, a copy of
2 which is hereto annexed, to be returnable according to law, and for such other and further relief as may be proper.

Dated New York, September 18, 1905.

Yours, etc.,
IRA A. PLACE,
Attorney for Applicant, The New York Central and Hudson River Railroad Company.

Room 417, Grand Central Station, Borough of Manhattan, New York City, N. Y.

To Hon. Otto Kelsey, Comptroller of the State of New York, Albany, N. Y.

3 STATE OF NEW YORK:

COMPTROLLER'S OFFICE,
ALBANY, *Sept.* 11*th*, 1905.

In the Matter of the Application of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY for a Revision of Taxes Assessed Against it, Under Chapter 908, Laws 1896, and the Acts Amendatory Thereof.

An application having been made by the above-named New York Central and Hudson River Railroad Company for a revision and resettlement of the taxes assessed and determined against it by the Comptroller of the State of New York, for the one year ending October 31, 1903, and the said Comptroller having heard the proofs offered on behalf of the said New York Central and Hudson River Railroad Company, in support of said application, and after due consideration thereof, the Comptroller does hereby determine that the amount of capital stock of the New York Central and Hudson River Railroad Company employed by the New York Central and Hudson River Railroad Company within this State for the year ending October 31, 1903, including the value of its tangible
4 assets, good will and franchises, was $122,535,265.99, and the assessment heretofore made against the said New York Central and Hudson River Railroad Company for the sum of one hundred eighty-five thousand seven hundred thirty-five and 7/100 dollars should be revised to the sum of one hundred eighty-three thousand eight hundred two and 90/100 dollars, which said sum of one hundred eighty-three thousand eight hundred two and 90/100 dollars is hereby determined as the amount which said New York Central and Hudson River Railroad Company was liable to pay under the provisions of Chapter 908, Laws of 1896, and the acts amendatory thereof for the one year ending October 31, 1903.

OTTO KELSEY, *Comptroller.*

5 *Petition for Writ.*

Supreme Court, Albany County.

(Tax of 1903.)

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

against

OTTO KELSEY, as Comptroller of the State of New York.

To the Supreme Court of the State of New York:

The petition of The New York Central and Hudson River Railroad Company respectfully shows:

I. This petitioner, The New York Central and Hudson River Railroad Company, is a domestic railroad corporation, having but

one kind of capital stock, organized and existing under the Laws of the State of New York, for steam surface railroad purposes, and is engaged in operating certain railroads owned or leased in the State of New York and certain railroads leased in other States, and was such railroad corporation and thus engaged during the year ending October 31, 1903, and therein as a common carrier for hire transacting the business of the transportation of persons and property, and that thereby and therein a part of its capital was employed in this State, and that continuously during the said tax year a part of its capital was thus employed outside of and not employed within the State of New York.

6 II. The defendant, Otto Kelsey is and has been since November 12, 1903, the Comptroller of the State of New York.

III. That on or before November fifteenth, 1903, this petitioner duly made a written report to the Comptroller of the State of New York, as required by Subdivision 1, of Section 189 of the Tax Law of the State of New York, being Chapter 908 of the Laws of 1896 of the State of New York, and the Acts amendatory thereof; a full and true copy of which said report is hereto annexed, marked Exhibit One, and made a part hereof.

IV. That the said report set forth and showed the condition of this petitioner at the close of its business on October 31st preceding, and stated the amount if its authorized capital stock to be $150,000,000, of which there was issued, paid up and outstanding from November 1, 1902, to January 1, 1903, $131,916,300, and from January 1, 1903, to October 31, 1903, $132,250,000, an average for the said tax year of $132,194,383, and that the average value of the said capital stock during the said tax year was $134.3125 per share, thus showing that the value of its entire average amount of issued capital stock was $177,553,580.67 and no more; that the date of the payment of each dividend declared by it during the year ending with said 31st day of October was as follows: January 15th, April 15th, July 15th, October 15th, 1903; that the aggregate rate per centum of the said dividends was five per centum; that such dividends amounted to less than six per centum on the par value of the capital stock of this petitioner; that the entire amount of the capital or assets of such corporation, this petitioner, wheresoever em-

7 ployed in and during the said tax year amounted to the sum of $369,518,732.68 and no more, of which capital or assets the said report set forth that $237,430,597.41 was the amount employed by such corporation, this petitioner, within this state during the year ending said October 31, 1903, whereas in truth and in fact $235,780,209.45 and no more, was the amount thereof actually employed within this state during the said tax year; and the said report set forth and showed that the amount of the said capital and assets employed by such corporation, this petitioner, outside of the State of New York during such year was $132,088,135.27, whereas in truth and in fact $133,738,523.23 was the amount of said capital and assets actually employed outside of this state in and during such year, and that therefore from November 1, 1902, to October 31, 1903, both

inclusive, as stated and shown by the said report, $114,085,292.58 was, whereas in truth and in fact $113,292,281.93 actually was the value of such portion of the capital stock of such corporation, this petitioner, as bears the same relation to the value of all thereof as the amount of its capital and assets employed within this state during the said tax year bears to the entire capital and assets of the corporation.

V. That subsequent to the said 15th day of November, 1903, to wit, on or about May 5, 1904, the said Comptroller audited and stated the account for the taxes to be paid by this petitioner under Section 182 of the Tax Law, and sent notice thereof to this petitioner.

VI. That the account so audited and stated was in words and figures following, to wit:

8 "COMPTROLLER'S OFFICE, ALBANY, N. Y.

THE NEW YORK CENTRAL AND HUDSON RIVER R. R. Co.

c/o E. L. ROSSITER, Treas.

GRAND CENTRAL STA., N. Y. C.

In account with the State of New York, *Dr.*

For Tax on Franchise or Business, based on Value of Capital Stock employed in New York State, per Chapter 908, Laws of 1896, and acts amendatory thereof, for the year ending October 31, 1903, as per report filed.

Appraised Value of Capital Stock.....	$123,823,381.40
Tax 1½ Mills	185,735.07"

VII. That on or about the 9th day of March, 1905, and within one year from the time that said account had been audited and stated, and notice thereof sent to this petitioner, this petitioner applied to the said Comptroller to revise and readjust the said account and to have said account resettled by striking therefrom, or by crediting to the account of this petitioner, the sum of $15,796.65; that the said application was made by written petition, duly verified on or about the 9th day of March, 1905, and entitled "In the Matter of the Application of The New York Central and Hudson River Railroad Company for a Revision and Readjustment of the Account heretofore audited and stated by the Comptroller of the State of New York for Taxes, under Section 182 of the Tax Law, for the year
9 ending October 31, 1903;" a full and true copy of which said petition and application is hereto attached, marked Exhibit Two, and by reference made a part hereof.

That thereafter, to wit, on or about the 28th day of March, 1905, the said Comptroller announced and informed said petitioner that as soon as he reasonably could he would fix a date upon which the said application could be heard, and subsequently, to wit, on

May 27, 1905, fixed the 6th day of June, 1905, as the day upon which the petitioner might be heard upon such application; that on the said 6th day of June, 1905, this petitioner duly appeared by its counsel before the Honorable Clark H. Timerman, the Deputy Comptroller; representing the said Comptroller, and gave testimony in support of said application; that upon said hearing it appeared from the revised and corrected figures that the entire amount of the capital of said corporation, this petitioner, was of the value and sum of $369,518,732.68, of which the amount of $235,780,209.45 and no more constituted its capital employed within this State during said tax year, and $133,738,523.23 was the amount of its capital employed outside of this State during said tax year; that the movable equipment of the said petitioner during the said tax year included passenger, mail and express cars of the value of $6,184,592.80, of which 84.03 per cent., or $5,196,913.33 and no more was the average portion thereof employed within the State of New York, and 15.97 per cent., or $987,679.47, was the average portion thereof which was continuously and at all times during the said tax year employed outside of and not within the State of New York, and that said petitioner's movable equipment also included freight
10 cars of the total value of $29,165,223.17, of which 36.86 per cent., or $10,750,301.26 and no more was the average portion of the said total freight car equipment which was during the said tax year employed within the State of New York, and that 63.14 per cent., or $18,414,921.91 was the average portion of petitioner's said total freight car equipment which was continuously and at all times during the said tax year employed outside of and not within the State of New York; that petitioner's said equipment and the capital invested therein, as and when in manner aforesaid used and employed outside of this State, whether by this petitioner or by other persons or corporations, were so used and employed solely and exclusively under authority of and in the exercise of corporate franchises granted to corporations of its or their creation by the respective states and territories and foreign dominions within whose territorial jurisdiction the said use and employment were had and conducted and not in the use or exercise of any franchise granted by or taxable in the State of New York, and all in and about the rendering and performance of the common carrier service of the transportation of persons and commodities between points of shipment and points of destination, respectively, within individual states, territories and dominions other than the State of New York, and and exclusively under authority of and in the exercise of corbetween points of shipment within the State of New York and points of destination in states and territories other than New York and in foreign dominions, and *vice versa*, and between points of shipment and points of destination and via routes altogether outside of the State of New York, and were thus used and employed in and about transportation local to individual states other than the State
11 of New York and transportation constituting and pertaining to interstate commerce and foreign commerce all in

such wise as did and does render it impossible for said petitioner to be informed or state the measure of such transportation employment constituting or pertaining to commerce local to any one or more individual states, or the measure thereof constituting or pertaining to interstate or foreign commerce, by means whereof to state or compute the amount of said assets or capital used or employed in either thereof, as distinguished or distinguishable from the other; and further that the average value of its capital stock during said tax year was $134.3125 per share, showing the average value of its $132,194,383 of capital stock during said tax year to have been the sum of $177,553,580.67 and no more, of which $113,292,281.93 was such portion of the value of the capital stock of such corporation, this petitioner, as the amount of its capital employed within this State bore to the entire capital of said corporation; that thereafter the said Comptroller made his determination, and sent written notice of his determination upon the said application, to the applicant, this petitioner, the said determination being as follows:

12 "STATE OF NEW YORK, COMPTROLLER'S OFFICE,
ALBANY, *Sept. 11th*, 1905.

In the Matter of the Application of NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY for a Revision of Taxes Assessed against it under Chapter 908, Laws of 1896, and the Acts Amendatory Thereof.

An application having been made by the above-named New York Central & Hudson River Railroad Company for a revision and resettlement of the taxes assessed and determined against it by the Comptroller of the State of New York, for the one year ending Oct. 31, 1903, and the said Comptroller having heard the proofs offered on behalf of the said New York Central & Hudson River Railroad Company, in support of said application, and after due consideration thereof, the Comptroller does hereby determine that the amount of capital stock of the New York Central & Hudson River Railroad Company employed by the New York Central & Hudson River Railroad Company within this State for the year ending October 31, 1903, including the value of its tangible assets, good will and franchises, was $122,535,265.99, and the assessment heretofore

13 made against the said New York Central & Hudson River Railroad Company, for the sum of One Hundred Eighty-five Thousand Seven Hundred Thirty-five & 7/100 dollars, should be revised to the sum of One Hundred Eighty-Three Thousand Eight Hundred Two & 90/100 dollars; which said sum of One Hundred Eighty-three Thousand Eight Hundred Two & 90/100 dollars is hereby determined as the amount which said New York Central & Hudson River Railroad Company was liable to pay under the provisions of Chapter 908, Laws of 1896, and the acts amendatory thereof for the one year ending October 31, 1903.

OTTO KELSEY, *Comptroller.*"

VIII. That in and by his said determination upon the said application and resettlement and readjustment of the said tax at and as of

the sum of $183,802.90, the said Comptroller computed the same at one and one-half mills upon each dollar of a valuation of $122,535,265.99; that the said valuation of $122,535,265.99 bears the same relation and proportion to $177,553,580.67, the average value of the entire capital stock of such corporation, this petitioner, during said tax year, as the amount of $255,016,407.03 bears to $369,518,732.68, the amount of the entire capital of such corporation, this petitioner; that the said amount of $255,016,407.03 included and embraced $19,236,197.58, being a part of and so much of $19,402,601.38, the amount and value of the average portion of the rolling stock of said corporation, this petitioner, which was proven before the said Comptroller to have been continuously employed outside of this State during the said tax year; that this petitioner then insisted, and ever since has insisted and now insists, that the said tax of $183,802.90 upon the said $122,535,265.99 valuation of its said capital stock was er-
14 roneously and unlawfully assessed or imposed and payment thereof, could not and cannot be lawfully demanded, and that the average portion of the average value of the capital stock of such corporation, this petitioner, throughout the said year which bore the same relation to the average value of the entire capital stock as the amount of capital employed within this State bore to the entire capital of the corporation, was $113,292,281.93 and no more; and that upon that sum only could such taxes be levied or imposed at the rate of one and one-half mills, amounting to $169,938.42 and no more, and that there should be such resettlement of said account as would result in striking therefrom or crediting to the account of said petitioner any and all excess of that sum; and then insisted and has ever since insisted and now insists that such portion of the value of the capital stock of the said corporation, this petitioner, as bore the same relation to the total value of its entire capital stock during said tax year as the amount and value of the average portion of its rolling stock continuously employed outside of this State during said tax year, bore to its entire capital wheresoever employed, during said year, did not nor did any part thereof constitute any part of the amount of its capital stock employed within this State, and that no tax could be lawfully computed, assessed or imposed upon the basis of such said portion of its capital stock; and that whatsoever sum of tax was computed, assessed or imposed upon the basis of such said portion of its said capital stock should be either stricken off or credited to the account of said corporation, this petitioner; that the basis of computation of the said tax as resettled and readjusted by the said Comptroller was as follows:

x: 177,553,580.67 : : 255,016,407.03 : 369,518,732.68.

15 In this statement x=$122,535,265.99, and the tax thereon at 1½ mills is $183,802.90.

That the deduction from the said $255,016,407.03 of the $19,236,197.58, being a part of and so much of $19,402,601.38, the amount and value of the average portion of the rolling stock of said corporation, this petitioner, proven before the

said Comptroller to have been continuously employed outside of this State during the said tax year, shows $235,780,209.45 and no more, as being the amount and value of the capital of said corporation, this petitioner, employed within this State during said tax year; that thus corrected the statement is as follows:

x: 177,553,580.67 : : 235,780,209.45 : 369,518,732.68.

In this statement x=$113,292,281.93, and the tax thereon at 1½ mills is $169,938.42, thus showing the said corporation, this petitioner, entitled to further resettlement of the tax by striking therefrom or crediting to this petitioner's account the further sum of $13,864.48.

IX. That taxation in and by the State of New York, for and upon and in respect of corporate creation, existence and capacity, for and during the designated term of corporate life, is by and under the law of the State of New York computed upon the basis of the amount of the authorized capital stock, and imposed, and paid, once for all, at the creation of the corporation, subject only to addition upon and in respect of subsequent increase of authorized capital stock.

That the tax here in question has relation to and is imposed in respect of the use and exercise of the corporate franchise granted by the State of New York, and as such, is at most, lawfully computable in respect of the use and exercise thereof within this State, and upon the basis of the value of that portion of the amount of petitioner's issued capital stock which has been employed within this State during the respective tax year.

That if and in so far as the enactments under color of which this tax is imposed purport to authorize taxation for or upon or in respect of the aforesaid use or exercise of franchises foreign to the State of New York, or computed upon the basis of capital thus in manner aforesaid used and employed within the territorial jurisdiction of other states, territories or foreign dominions in the use and exercise of, and under the authority of franchises granted by them or by the United States to corporations created by them, respectively, the said enactments are beyond the power and prerogative of the State of New York to prescribe and enforce and are violative of and contravene the constitution laws and treaties of the United States in that they deprive petitioner of the equal protection of the laws; also, in that they constitute the taking of property without due process of law; also, in that they constitute a regulation of, interference with and a burden upon interstate commerce and foreign commerce; also, in that they impugn the dignity and sovereignty of the United States and of sister states and of foreign dominions; also, in that they impair the obligations of the contracts arising upon and inhering in the grant to and acceptance by the corporations the lessors and licensors of said petitioner of the franchises by it as lessee and licensee used and exercised in respective states, territories and dominions other than and foreign to the State of New York; also, in that they impair the obligations of the contracts of lease of trackage right and license respectively, under and by virtue of which peti-

tioner uses and exercises in respective states and territories
17 other than the State of New York and in foreign dominions the franchises granted by them respectively to the lessors and licensors of said petitioner; also, in that they impair the obligations of the contracts, express and implied, under which petitioner is required to and does order, direct and permit or order, direct or permit its movable equipment to pass to and remain in the custody and subject to the control of other corporations and be by them controlled and used in and about the transportation of persons and property upon their roads in other states and territories and foreign dominions under authority of and in the use and exercise of franchises granted by them respectively; also, in that the said enactments, and the judgments of the officers and tribunals in and of the State of New York sustaining and administering them, in and by imposing and exacting payment to the State of New York of a franchise tax computed upon the basis of the capital of said petitioner employed within the territorial jurisdiction of other respective States, in the use and exercise of franchises granted by them, respectively, deny and refuse to give "to the public acts" of said other respective States, by and under which the said franchises are granted, and the use and exercise thereof authorized and regulated, the "full faith and credit" force and effect which the said public acts are entitled to have, and do have, in the respective States whose acts they are, by reason whereof the said petitioner alleges that the said sum of $13,864.48, the purported tax of one and one-half mills upon $9,242,984.06 in excess of $113,292,281.93, the value of the amount of $84,349,767.83 the par value of its capital stock employed within the State of New York, is erroneously and unlawfully as-
18 sessed and imposed, and that payment thereof should not have been demanded, and could not and cannot be lawfully demanded, and is wholly and altogether without foundation or authority of law.

X. That heretofore this petitioner duly deposited with the Treasurer of the State of New York the full amount of the taxes, percentage, interest and other charges audited and stated in the said account, and duly filed an undertaking with the said Comptroller in an amount and with sureties approved by a Justice of the Supreme Court of the State of New York, to the effect that if the said writ is dismissed, or the said determination is confirmed, this petitioner will pay any and all charges and costs which may accrue against it in the prosecution of the writ, including costs of all appeals, a copy of such undertaking being hereto annexed, and marked "Exhibit Three."

XI. That your petitioner is aggrieved by the said determination of the said Comptroller. That no previous application for this writ has been made to any Court or Judge.

Wherefore, your petitioner, desiring to review both upon the law and the facts said determination of the said Comptroller, upon such application made to him by your petitioner for a revision and resettlement of so much of the said account, assessment and tax hereinabove set forth as embraces and is upon and in respect of such

part of and so much of the value of its capital stock as bears the same relation to all thereof as the value of the average amount of its rolling stock equipment in manner aforesaid continuously employed outside of the State of New York during the said tax
19 year ending October 31, 1903, bears to the total value of its entire capital wheresoever employed during the said tax year, prays that a writ of certiorari may issue out of the Supreme Court of the State of New York, directed to the said Comptroller of the State of New York, commanding the said Comptroller to certify and return at the office of the Clerk of Albany County all and singular the evidence before him on such application, and all the papers and proofs upon the original statement of such account, and all the proceedings thereon and all his decisions and actions in the premises, with all the evidence, documents, reports, records and papers relating thereto in his possession or under his control, submitted to or considered by him, concerning the said account and the grounds for his refusal to revise and readjust the same, in and regarding the particulars hereinabove set forth, to the end that his said decisions and determinations may be reviewed and the said original and resettled account corrected and restated, and that this petitioner have such other and further relief as may be proper.

Dated New York, September 26th, 1905.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
By E. V. W. ROSSITER, *Vice-President.*

IRA A. PLACE,
Attorney for Petitioner, Grand Central Station, Borough of Manhattan, New York City, N. Y.

20 STATE OF NEW YORK, *County of New York, ss:*

Edward L. Rossiter, being duly sworn, says: That he is an officer of the New York Central and Hudson River Railroad Company, the petitioner above named, to wit, the treasurer thereof; that the foregoing petition is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

E. L. ROSSITER.

Sworn to before me this 26th day of September, 1905.

GEO. T. BROWN,
Notary Public, Westchester County.

Certificate filed in N. Y. County.

21 EXHIBIT ONE.

Report of the New York Central and Hudson River Railroad Company for the year ending October 31, 1903, made pursuant to provisions of Sec. 182, Chapter 908, Laws of 1896, and acts amendatory thereof.

(Give post-office address of Company, Street and No.)

GRAND CENTRAL STATION, NEW YORK,
Dec. 15th, 1903.

To the Comptroller of the State of New York:

Agreeably to law, as Treasurer of the above Company, I make the following report, viz.:

1. This company began business in the State of New York in the month of November, 1869.
2. The last report made by this Company to the Comptroller of the State of New York under the provisions of the above act was made for the year ending October 31st, 1902.
3. Value of Real Estate and of interest or interests in real property in New York State, and where situated. Cannot give.
4. Organized under the laws of the State of New York.
5. Date of Organization of the Company, November 1st, 1869.
6. Total authorized Capital of Company (authorized by stockholders)..... $150,000,000.00
7. Whole number of shares of stock authorized, 1,500,000.
8. Number of shares of stock issued 1,322,500.
9. Par value of each share..... $100.00
10. Amount paid into the Treasury of the Company on each share..... $100.00

22 11. *a.* Amount of Capital paid in cash or property .....
b. Amount of Capital paid in good will $132,250,000.00
c. Amount of Capital paid in patents or copyrights.....

12. Amount of Capital upon which dividends were declared (Jany. 15th, $131,916,300). $132,250,000.00
13. Date of each dividend paid, Jan. 15th, April 15th, July 15th, & Oct. 15th.
14. Amount of each dividend paid Jan. 15th, $1,648,953.75; April 15th, $1,653,125.00; July 15th $1,653,125.00; Oct. 15th, $1,653,125.00.
15. Rate per cent. per annum of dividends, 5%.
16. The business transacted by this Company in the State of New York for the year ending October 31st, 1903, was as follows, viz: (Give nature of business and how carried on.)
Transportation.

17. And such business was carried on at the following named place or places: (Give Street and number.)
Numerous places.
18. Capital employed in New York State, $84,934,891.29.
(Preceding line need not be filled out by companies whose capital is all employed in this State.)
19. If not in New York State, where and how employed, permanently employed and invested outside of New York State.
20. What percentage of capital is employed in manufacturing in State of New York?
21. Highest price of sales of stock during the year aforesaid..156.
22. Lowest price of sales of stock during the year aforesaid...112⅝

(Signed) E. L. ROSSITER, *Treasurer.*

23 STATE OF NEW YORK, *County of New York, ss:*

On this 15th day of December, A. D. 1903, personally appeared before me, a notary public in and for the County of New York, E. L. Rossiter, treasurer of the above-named company, who, being duly sworn according to law, did depose and say, that the foregoing report is just, true and correct according as the accounts stand in the books of the company, and that it includes all dividends, whether in cash, stock, scrip or of any other character or description, declared by said company during the year ending on the thirty-first day of October, A. D. 1903.

(Signed) E. L. ROSSITER, *Treasurer.*

Sworn to and subscribed before me the day and year aforesaid.

(Signed) LOUIS BENDER,
[L. S.] *Notary Public,* No. 51.

Remarks.

Capital stock from Nov. 1st, 1902, to Jan. 1st, 1903.	$131,916,300.00
Capital Stock from Jan. 1st, 1903, to Oct. 31, 1903.	$132,250,000.00
Average capital stock for year ended Oct. 31st, 1903	$132,194,383.00

Of the total capital of this company, $19,402,601.38 in value of its equipment was employed outside of New York State. This amount is determined by taking such proportion of the value of passenger, mail and express cars as the wheelage outside of the state bears to the wheelage both in and out of the state and such proportion of the value of freight cars as the number of days cars were outside of the state bears to the total number of days (number of cars multiplied by 365 days) both in and out of the state.

24 *Recapitulation of Distribution of Assets.*

October 31, 1903.

	In New York State.	Outside N. Y.	Total.
Cost of road and equipment...	$177,963,733.51	$19,817,142.24	$197,780,875.75
Advances lessor companies ...	6,529,356.93	827,397.61	7,356,754.54
Stocks of other companies.....	16,522,269.97	109,768,477.05	126,320,747.02
Bonds of other companies. ..	4,884,495.24	.....	4,884,495.24
Cash and cash assets.....	20,188,076.79	.....	20,188,076.79
Ownership in other lines, real estate, etc.....	3,789,329.63	1,175,118.37	4,964,448.00
Bonds bought for % sinking fund.....	1,919,520.68	.....	1,919,520.68
Fuel and supplies.....	5,325,700.23	500,000.00	5,825,700.23
Items temporarily held in suspense	278,114.43	.....	278,114.43
	$237,430,597.41 64.25 %	$132,088,135.27 35.75 %	$369,518,732.68 100 %

25 EXHIBIT TWO.

In the Matter of the Application of NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY for a Revision and Readjustment of the Account Heretofore Audited and Stated by the Comptroller of the State of New York for Taxes Under Section 182 of the Tax Law, for the Year Ending October 31, 1903.

To the Honorable Otto Kelsey, Comptroller of the State of New York:

The application of The New York Central and Hudson River Railroad Company respectfully shows:

1. That it is a railroad corporation duly organized and existing under the laws of the State of New York, and as such during the aforementioned tax year was engaged in operating certain railroads by it owned and leased in the State of New York, and certain railroads by it leased in other States, and thereby as a common carrier for hire transacting the business of the transportation of persons and property, and that thereby and therein a part of its capital was employed in this State, and that continuously during the said tax year a part of its capital was employed outside of and not employed within the State of New York.

26 2. That on or about the 15th day of November, in the year 1903, it duly made a written report to the Comptroller of the State of New York as required by subdivision 1 of Section 189 of the Tax Law, such report being in the form prescribed by the said Comptroller of the State of New York; and that such report showed the condition of the said company at the close of its business on October 31st preceding, and that in said report was stated the

amount of its authorized capital stock, the amount thereof issued and outstanding, the date and rate per centum of dividend declared by it in each quarter of the year ending on the said October 31, 1903, the entire capital stock of the said corporation and stated correctly, except as shown in paragraph 4 hereof, the amount thereof employed in this State during the said tax year, computed upon the basis in and by the said report set forth. That as set forth and shown in and by the said report the amount of the authorized capital stock of this company was $150,000,000, of which there was issued, paid up and outstanding from November 1, 1902, to December 31, 1902, $131,916,300, and from January 1, 1903, to October 31, 1903, $132,250,000, an average for the said tax year of $132,194,383, and that the average value of said capital stock during the said tax year was $134.3125 per share, thus showing that the value of its entire average amount of issued capital stock was $177,553,580.67, and no more.

3. That the total assets of the said petitioner wheresoever employed in and during the said tax year amounted to the sum of $369,518,732.68, and no more, of which assets amounting to the sum of $235,780,209.45, and no more, were employed within the State of New York, and of which total, assets amounting to
27 the sum of $133,738,523.23 were continuously and at all times in and during the said tax year employed outside of and not within the State of New York. That the average amount of its capital stock at par employed within this State was $84,349,767.83 of the average value of $113,292,281.93, and that of the average amount of its entire capital stock $47,844,615.17 of the average value of $64,261,298.74 was continuously and at all times in and during the said tax year employed outside of this State, and the tax lawfully computed and imposed in respect thereof was and would be the sum of $169,938.42, and no more.

4. That in and about the division of items of petitioner's said total assets pertaining to and for its said report to the State Comptroller the said petitioner by inadvertence embraced and included its entire holding of $2,597,400 of the capital stock of the Merchant's Despatch Transportation Company as of and being assets employed within the State of New York, whereas in truth and in fact only and no more than $947,012.00 thereof was employed within this State in or during the said tax year, thus involving and presenting an excess of $1,650,387.96 over and above the amount of its total assets in fact employed within the State of New York in and during the said tax year.

That computation upon the said basis erroneously made it to appear that $590,422.07 at par, and $793,010.65 at average value of petitioner's capital stock was employed in this State, which was not in fact employed therein in and during the said tax year, and thus constituted an apparent basis for computation and imposition of tax thereon in the sum of $1,189.52 which was in truth and in fact erroneous and excessive.

5. That subsequent to the said 15th day of November,
28 1903, to wit: on or about May 6, 1904, the said Comptroller audited and stated the account of taxes to be paid by said

company and sent to it notice thereof. That the said account so audited and stated was of and for a tax of $185,735.07, purporting to be a tax of one and one-half mills upon an appraised valuation of $123,823,381.45, the supposed basis thereof being that there was employed within this State in and during said tax year $257,697,191.01 of petitioner's said total assets, $92,190,512.01 of petitioner's said average capital stock at par, and $123,823,381.45 of average value of petitioner's said total capital stock.

6. That the said appraised valuation of $123,823,381.45, upon which the said tax was as aforesaid computed and imposed, included therein $10,531,099.52 of, as and being the appraised valuation of capital stock of the said company, no part of which was or consisted of such portion of the capital stock at par of the said company, as the amount of its capital employed within the State of New York in or during the year for which the said report was made, and for which the said tax was imposed, bears to the then entire capital of the said company; that the said tax so imposed upon the said $10,531,099.52 amounts to the sum of $15,796.65; that the said company has insisted and now insists that the said tax of $15,796.65 upon the sum of $10,531,099.52, no part thereof being of or within such portion of its capital stock at par as the amount of its capital employed within this State bears to its entire capital, was erroneously and unlawfully assessed and imposed and payment thereof could not and cannot be lawfully demanded, and that the said $15,796.65 of tax is wholly without authority of law.

29 7. That in truth and in fact only and no more than $84,349,767.83 of the capital stock of said company was the portion of its said entire capital stock at par which bore the same relation to the said entire capital stock as the amount of capital employed within the State of New York in or during the year for and on account of which said report was made and the said tax imposed, bore to the entire capital of said company; and that the balance of the entire amount of its capital stock, to wit, the amount of $47,844,615.17 thereof, bore the same relation to the amount of capital which was during the said year employed outside of the State of New York; by reason whereof the said company avers that the sum of $15,796.65, the purported tax of one and one-half mills upon $10,531,099.52 in excess of the $113,292,281.93, the value of the amount of $84,349,767.83, the par value of its capital stock employed within this State, is erroneously and unlawfully assessed and imposed, and that payment thereof should not have been demanded and could not and cannot be lawfully demanded, and is without foundation or authority of law.

8. The said petitioner is informed and believes and thereupon alleges that consequent upon misapprehension and erroneous supposition upon the part of the said Comptroller that petitioner had either not included any or had included an insufficient portion of its said holding of $2,597,400.00 of the capital stock of the Merchant's Despatch Transportation Company in the $237,430,597.41 of its assets reported employed in this State, he, the said Comptroller, for and in respect of the portion of said Merchant's Despatch Trans-

portation Company's capital stock deemed by him to have been employed in this State, and not so reported by this petitioner, and as constituting the basis of the tax as appraised, computed and imposed, wholly or in part in respect thereof added to the respective amounts stated in petitioner's said report the following, to wit, to the $237,430,597.41 total assets reported employed in this State, the further amount of $863,992.22; to the $114,085,292.58, total average value of capital stock reported employed in this State, the further amount of $415,147.86; and as additional tax in respect thereof $622.72. And the said petitioner alleges that if and to the extent that the said amounts were not so added by reason of and consequent upon the aforementioned misapprehension and erroneous supposition upon the part of the said Comptroller, they and each thereof were so added without evidence or fact in their support; and that the said additions are and the said $622.72 of tax is wholly and altogether and in every part unauthorized, erroneous and illegal, and payment of the said tax should not have been demanded and could not and cannot be lawfully demanded.

9. That the State Comptroller, as and constituting the basis of the tax so as aforesaid by him computed, imposed and demanded, also and further added to the respective amounts in and by petitioner's said report stated and set forth as the basis of and for computation of the said tax for said tax year, for and in respect of the average value of petitioner's movable equipment shown by its said report to have been continuously and at all times during the said tax year used and employed outside of the State of New York, to wit, to the $237,430,597.41, total assets reported employed in this State, the further amount of $19,402,601.38; to the $114,085,292.58, average value of capital stock reported employed in this State, the further amount of $9,322,941.01; and as the additional tax in respect of and computed upon said amounts the sum of $13,984.41.

Concerning the said movable equipment the said report of petitioner to the State Comptroller sets forth that:

"Of the total capital of this company $19,402,601.38 in value of its equipment was employed outside of New York State. This amount is determined by taking such proportion of the value of passenger, mail and express cars, as the wheelage outside of the State bears to the wheelage both in and out of the State, and such proportion of the value of freight cars as the number of days cars were outside of the State bears to the total number of days (number of cars multiplied by 365 days) both in and out of the State."

The items composing the said amount and value of $19,402,601.38 are as follows:

Value of average number of this company's passenger, mail, express and freight cars used by it upon roads outside of N. Y. State.....	$3,148,216.64
Value of average number of this company's passenger, mail, express and freight cars used by other companies outside of N. Y. State.....	$16,254,384.74

That petitioner's said equipment, and the capital invested therein, as and when in manner aforesaid used and employed outside of this State, whether by this petitioner or by other persons or corporations, were so used and employed solely and exclusively under authority of and in the exercise of corporate franchises granted to corporations of its or their creation by the respective states and territories and foreign dominions within whose territorial jurisdiction the said use and employment were had and conducted and not in the use or exercise of any franchise granted by or taxable in the State of New York, and all in and about the rendering and performance of the common carrier service of the transportation of persons and commodities between points of shipment and points of destination, respectively, within individual states, territories and dominions other than the State of New York, and between points of shipment within the State of New York and points of destination in states and territories other than New York and in foreign dominions, and *vice versa,* and between points of shipment and points of destination and via routes altogether outside of the State of New York, and were thus used and employed in and about transportation local to individual states other than the State of New York and transportation constituting and pertaining to interstate commerce and foreign commerce all in such wise as did and does render it impossible for said petitioner to be informed or state the measure of such transportation employment constituting or pertaining to commerce local to any one or more individual states, or the measure thereof constituting or pertaining to interstate or foreign commerce, by means whereof to state or compute the amount of said assets or capital used or employed in either thereof, as distinguished or distinguishable from the other.

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That taxation in and by the State of New York, for and upon and in respect of corporate creation, existence and capacity, for and during the designated term of corporate life, is by and under the law of the State of New York computed upon the basis of the amount of the authorized capital stock, and imposed, and paid, once for all, at the creation of the corporation, subject only to addition upon and in respect of subsequent increase of authorized capital stock.

That the tax here in question has relation to and is imposed in respect of the use and exercise of the corporate franchise granted by the State of New York, and, as such, is, at most, lawfully computable in respect of the use and exercise thereof within this State and upon the basis of the value of that portion of the amount of petitioner's issued capital stock which has been employed within this State during the respective tax year.

33

That if and in so far as the enactments under color of which this tax is imposed purport to authorize taxation for or upon or in respect of the aforesaid use or exercise of franchises foreign to the State of New York or computed upon the basis of capital thus in manner aforesaid used and employed within the territorial jurisdiction of other states, territories or foreign dominions in the use and exercise of and under the authority of franchises granted by them or by the United States to corporations created by them, respectively, the said enact-

ments are beyond the power and prerogative of the State of New York to prescribe and enforce and are violative of and contravene the constitution laws and treaties of the United States in that they deprive petitioner of the equal protection of the laws; also, in that they constitute the taking of property without due process of law; also, in that they constitute a regulation of, interference with and a burden upon interstate commerce and foreign commerce; also, in that they impugn the dignity and sovereignty of the United States and of sister states and of foreign dominions; also, in that they impair the obligations of the contracts arising upon and inhering in the grant to and acceptance by the corporations, the lessors and licensors of said petitioner, of the franchises by it as lessee and licensee, used and exercised in respective states, territories and dominions other than and foreign to the State of New York; also, in that they impair the obligations of the contracts of lease of trackage right and license respectively, under and by
34 virtue of which petitioner uses and exercises in respective states and territories other than the State of New York and in foreign dominions the franchises granted by them respectively to the lessors and licensors of said petitioner; also, in that they impair the obligations of the contracts, express and implied, under which petitioner is required to and does order, direct and permit or order, direct or permit its movable equipment to pass to and remain in the custody and subject to the control of other corporations and be by them controlled and used in and about the transportation of persons and property upon their roads in other states and territories and foreign dominions under authority of and in the use and exercise of franchises granted by them respectively; also, in that the said enactments and the judgments of the officers and tribunals in and of the State of New York sustaining and administering them, in and by imposing and exacting payment to the State of New York of a franchise tax computed upon the basis of the capital of said petitioner employed within the territorial jurisdiction of other respective States, in the use and exercise of franchises granted by them, respectively, deny and refuse to give "to the public acts" of said other respective States, by and under which the said franchises are granted and the use and exercise thereof authorized and regulated, the "full faith and credit" force and effect which the said public acts are entitled to have and do have in the respective States whose acts they are, by reason whereof the said petitioner alleges that the said sum of $13,984.41, the purported tax of one and one-half mills upon $9,322,941.01 in excess of $113,292,281.93, the value of the amount of $84,349,767.83, the par value of its capital stock employed within the State of New York is erroneously and unlawfully assessed and imposed, and that payment thereof should not
35 have been demanded and could not and cannot be lawfully demanded and is wholly and altogether without foundation or authority of law.

Wherefore the said company makes this application and prays that the said account so audited and stated be revised and re-adjusted and that the said account be re-settled by striking therefrom or by

crediting to the account of the said company the said sum of $15,796.65 and that the said company have such other or further relief as may be proper.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
By E. L. ROSSITER, *Treasurer.*

IRA A. PLACE,
Attorney for the Applicant, Grand Central Station, Borough of Manhattan, New York City, N. Y.

STATE OF NEW YORK, *County of New York, ss:*

Edward L. Rossiter, being duly sworn, says that he is an officer of the New York Central and Hudson River Railroad Company, the applicant above named, to wit, the treasurer thereof; that the foregoing application is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters *be* believes it to be true.

E. L. ROSSITER.

Sworn to before me this 9th day of March, 1905.

ALBERT B. QUENCER,
Notary Public, New York County.

36 EXHIBIT THREE.

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

against

OTTO KELSEY, as Comptroller of the State of New York.

Whereas, the above named, The New York Central and Hudson River Railroad Company, heretofore, on or about the 9th day of March, 1905, applied to the Comptroller of the State of New York to revise and readjust the account heretofore audited and stated by the said Comptroller, imposing a tax upon the said The New York Central and Hudson River Railroad Company for the year ending October 31st, 1903, under Section 182 of the Tax Law, and to have said account resettled by striking therefrom, or by crediting to the account of said railroad company the sum of fifteen thousand seven hundred ninety-six and 65/100 dollars ($15,796.65), and the said Comptroller having thereafter, a hearing having been had upon the said application, made his determination, allowing a credit to
37 the said company on the books of the department of the sum of one thousand nine hundred thirty-two and 17/100 dollars; and

Whereas, the said The New York Central and Hudson River Railroad Company is dissatisfied and aggrieved by the said determination, and intends to review the said determination by writ of certiorari, and desires to file an undertaking with the writ of certiorari, and desires to file an undertaking with the said Comptroller as required by Section 197 of the Tax Law;

Now, therefore, the National Surety Company, a corporation duly authorized by the laws of the State of New York to execute surety bonds, having an office and principal place of business at No. 346 Broadway, Borough of Manhattan, City of New York, does hereby undertake that if the said writ of certiorari, which may be granted upon the application of the said The New York Central and Hudson River Railroad Company to review the said determination, be dismissed, or the determination of the Comptroller be confirmed, the said The New York Central and Hudson River Railroad Company will pay all costs and charges which may accrue against it in the prosecution of the said writ, including the cost of all appeals, not exceeding the sum of five hundred ($500.00) dollars.

Dated New York, September 18th, 1905.

NATIONAL SURETY COMPANY,
By JOEL RATHBONE, *Res. Vice President.*

Attest: RICHARD J. MORIARTY,
[L. S.] *Res. Assist. Secretary.*

38 STATE OF NEW YORK, *County of New York, ss:*

On this 18th day of September, 1905, before me personally appeared Joel Rathbone, Res. Vice-President of the National Surety Company, with whom I am personally acquainted, who being by me duly sworn, said that he resides in the County of New York; that he is the Res. Vice-President of the National Surety Company, the corporation described in and which executed the within instrument; that he knows the corporate seal of said Company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the board of directors of said Company, and that he signed said instrument as Res. Vice-President of said Company by like authority; and that the liabilities of said Company do not exceed its assets, as ascertained in the manner provided in Section 3, Chapter 720 of New York Session Laws of 1893. And the said Joel Rathbone further said that he is acquainted with Richard J. Moriarty, and knows him to be the Res. Ass't Secretary of said Company; that the signature of the said Richard J. Moriarty subscribed to the said instrument is in the genuine handwriting of the said Richard J. Moriarty and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said Joel Rathbone, Res. Vice-President.

BELLE F. JAIS,
Notary Public for the County of N. Y.

Certificate filed in Kings, Westchester, Richmond and Queens Counties.

39 *Copy of By-Law.*

Be it remembered, that at a regular meeting of the Board of Directors of the National Surety Company, duly called and held on the 6th day of February, 1900, a quorum being present, the following by-law was adopted:

"ARTICLE XIII. SEC. 1.—*Signatures Required.* All bonds, recog-"nizances, contracts of indemnity and other writings obligatory in "the nature thereof, shall be signed by the President, the Vice-"President, the Second Vice-President, a Resident Vice-President, or "an attorney in fact, and, except when signed by an attorney in "fact, shall have the seal of the Company affixed thereto, duly at-"tested by the Secretary, an Assistant Secretary or a Resident As-"sistant Secretary. The Vice-President, Second Vice-President and "Resident Vice-President shall each have authority to sign such in-"struments whether the President be absent or incapacitated or not; "and the Assistant Secretaries and Resident Assistant Secretaries "shall each have authority to seal and attest such instruments, "whether the Secretary be absent or incapacitated or not. All such "instruments executed as herein provided shall be as binding upon "the Company as if the same were signed by the President, duly "sealed and attested by the Secretary."

STATE OF NEW YORK, *County of New York, ss:*

I, Richard J. Moriarty, Res. Ass't Secretary of the National Surety Company, have compared the foregoing copy of by-law with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original by-law.

Given under my hand and seal of the Company this 18th day of September, 1905.

RICHARD J. MORIARTY,
[L. S.] *Res. Ass't Secretary.*

40 At a Special Term of the Supreme Court, held in and for the County of Albany, at the County Court House in the City of Albany, N. Y., on the 29th day of September, 1905.

Present: Hon. G. D. B. Hasbrouck, Justice.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

against

OTTO KELSEY, as Comptroller of the State of New York.

Order for Issuance of Writ of Certiorari.

Tax of 1903.

On reading and filing the petition verified and dated the 26th day of September, 1905, of The New York Central and Hudson

River Railroad Company, and upon the undertaking heretofore filed by the said railroad company, pursuant to section 197 of the Tax Law, and upon the notice of this application duly served on the Comptroller of the State of New York, and after hearing Harris & Rudd, Esqrs., of counsel for the petitioner, and on motion of Ira A. Place, Esq., attorney for the petitioner, the Attorney General appearing and consenting to the making of the application at this time instead of on September 30th, 1905, it is

Ordered that a writ of certiorari do issue from and out of this Court pursuant to the prayer of the petitioner, directed to
41 Otto Kelsey, as Comptroller of the State of New York, to review the decision and determination of the said Comptroller mentioned and described in the petition, and the question involving the merits therein mentioned, both upon the law and the facts, which writ shall be returnable within twenty days after service thereof upon the said Comptroller, at the office of the Clerk of Albany County.

Enter.

JOHN FRANEY, *Clerk.*

42 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

against

OTTO KELSEY, as Comptroller of the State of New York.

Writ of Certiorari.

Tax of 1903.

Whereas we have been informed by the verified petition of The New York Central and Hudson River Railroad Company, dated and verified the 26th day of September, 1905, that certain proceedings have been had before the Comptroller of the State of New York in a certain matter entitled "In the Matter of the Application of The New York Central and Hudson River Railroad Company for a revision and Readjustment of the account heretofore audited and stated by the Comptroller of the State of New York for taxes under section 182 of the Tax Law, for the year ending October 31st, 1902," upon the application of the said Railroad Company to revise and readjust an account theretofore audited and stated by the said Comptroller of the State of New York for taxes to be paid by the said The New York Central and Hudson River Railroad Company under section 182 of the Tax Law, the petition upon which the said application was made being verified March 9, 1905, and a hearing upon such application having been had on the 6th day of June, 1905, and the said Comptroller having there-
43 after made his determination and sent written notice of his determination upon such application to the applicant, the

petitioner herein, allowing in part and denying in part the application for revision or readjustment of the said account, and the said The New York Central and Hudson River Railroad Company having now made application to this Court for a writ of certiorari to review, in so far as the said application was denied and refused, the said decision and determination of the said Comptroller.

And we being willing for certain purposes to be certified of such proceedings, if any such were had, do hereby command and strictly enjoin Otto Kelsey, as Comptroller of the State of New York, that he certify and return all and singular the evidence before him on such application, and all the papers and proofs upon the original statement of such account and all proceedings thereon, and all his decisions and actions in the premises, with all the evidence, documents, reports, records and papers relating thereto in his possession or under his control, submitted to or considered by him, concerning the said account and the grounds of his refusal to revise and readjust the same, as prayed for in the petition, within twenty days after the service upon him of this writ, at the office of the Clerk of Albany County, under his proper hand, pursuant to the provisions of the Tax Law and the provisions of Title II. of Chapter 16 of the Code of Civil Procedure, so that our Supreme Court may further cause to be done thereon what of right and according to law ought to be done, and let the defendant have then and there this writ.

Witness the Hon. G. D. B. Hasbrouck, Justice of our Hon-
44 orable Court, at the Court House in the City of Albany, N. Y., this 29th day of September, 1905.

JOHN FRANEY, *Clerk.*

IRA A. PLACE,
Attorney for the Relator, Grand Central Station, Borough of Manhattan, New York City, N. Y.

The above writ is hereby allowed this 29th day of September, 1905.

G. D. B. HASBROUCK,
Justice Supreme Court.

45 *Return.*

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

against

OTTO KELSEY, as Comptroller of the State of New York.

1903.

Otto Kelsey, as Comptroller of the State of New York, the respondent herein, makes return to the writ of certiorari herein as follows:

I. He admits the truth of the allegations contained in paragraphs 2, 3, 5, 6 and 10 of the petition herein.

II. He admits that the petitioner is a domestic railroad corporation, organized and existing under the laws of this State for a steam surface railroad purposes, engaged in operating certain railroads, and was so engaged during the year ending October 31, 1903, as a common carrier for hire transacting the business of the transportation of persons and property. That the report mentioned in
46 paragraph 3 of the said petition stated the amount of the authorized capital stock of petitioner to be $150,000,000, of which there was issued, paid up and outstanding from November 1, 1902, to January 1, 1903, $131,916,300, and from January 1, 1903, to October 31, 1903, $132,250,000, an average of $132,154,383. That the dates of payments of dividends and the rate thereof were as mentioned in paragraph 4 of said petition. That the said report stated the entire amount of the capital or assets of the petitioner to be $369,518,732.68.

III. He admits that the application for the revision and readjustment of the account for taxes mentioned in paragraph 7, was made and granted and that the rehearing mentioned therein was held, at which time the petitioner appeared by its counsel and submitted evidence. That the Comptroller thereupon resettled and readjusted said account for taxes at the sum of $183,802.90.

IV. He denies the truth of the allegations of said petition, except as the same are expressly admitted herein.

V. He returns herewith the evidence and exhibits used in the proceedings before him, except those, copies of which are attached to the petition herein.

VI. He further alleges that the tax mentioned in said petition, was regularly, duly and legally imposed, settled and collected, pursuant to the provisions of the Tax Law of this State, and that the relator is not justly aggrieved thereby.

47 In witness whereof, the Comptroller has hereunto set his hand and seal this 20th day of October, 1905.

OTTO KELSEY, *Comptroller,*

[L. S.] By WILLIS E. MERRIMAN,
2nd Dep. Comptroller.

(Endorsed.)

SIR: Take notice that the within is a copy of a return duly filed and entered in the office of the Clerk of Albany County, on the 20th day of October, 1905.

Yours, etc.,

JULIUS M. MAYER,
Attorney-General, Attorney for Resp'd't.

To Ira A. Place, Attorney for Relator.

48 State of New York, Comptroller's Office.

In the Matter of the Application of the NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY for a Revision and Readjustment of Taxes Assessed Under the Provisions of Chapter 908, Laws of 1896, and the Acts Amendatory Thereof for the Years 1902, 1903 and 1904.

Rehearing held at the office of the State Comptroller, June 6th, 1905, before Honorable Clark H. Timerman, Deputy State Comptroller.

Appearances.

J. H. Foulds, Jr., for the Company.
F. E. Williamson, for the Company.
Ira A. Place, represented by Thomas Emery, as counsel.

By COUNSEL: Now we have the three capital stock matters.

Mr. MERRILL: 1902, 1903 and 1904.

By COUNSEL: Yes, it will be a useless repetition to take the evidence separately for each, unless for reasons you desire to have it so.

Mr. MERRILL: Just make a statement of your contention, Mr. Emery.

49 By COUNSEL: Well, briefly, it is set out in our application, of course. Taking up the first, the year 1902.

Mr. MERRILL: What is this amount of $2,311,686.00, for instance, in this 1902 contention, what is that, on what ground do you claim that that should be excluded?

By COUNSEL: That is the capital stock of the M. D. T. Co.

Mr. MERRILL: Yes, that is the only new question you have involved here, that capital stock.

By COUNSEL: This is the situation, to state it as briefly as I can. In a previous year we had made the question whether we should be taxed on our holdings of Merchant's Despatch Transportation Company stock. We had been reporting it, including for taxation such percentage as we understood, such percentage of our holdings of that stock as constituted proportion of M. D. T. stock capital employed in this State. The Appellate Division, when the matter went there for review, held that we were liable to be taxed for all of it, and pending that judgment and before its review by the Court of Appeals one of our reports was made following judgment of the Appellate Division and including it all. Subsequently that was reversed and our contention sustained by Court of Appeals, but our Tax Department didn't understand that, and it resulted in the following year they included it all. On the other hand, this office supposed we hadn't included any of it. At any rate, that is the understanding I have of it, which I think Mr. Merrill will confirm, that we had included it all, and they thought we hadn't included any, so they added to it what they claim should be in. That
50 was one item, and that is the essential thing in which the figures are changed in the amended application from the original one, because in the meantime we learned where we were at, and

that is we had made one mistake and the office here made another by reason of misapprehension of what we had done.

By Deputy Comptroller TIMERMAN:

Q. You wish to have this tried out along lines of Court of Appeals decision?

By COUNSEL: I do not think there is any question between us about that now. As I understand it it is simply to get proper figures before this department,

What I have said thus far would not give you complete idea of change of our application. The amended application changes further this feature. In the other cases we put in the evidence calculated to lay the foundation, as we thought, for a review by the United States Supreme Court, if desirable. Upon the hearing in the Court of Appeals our remittitur was made to show that the constitutional questions were raised, and in order to put beyond peradventure any question on that subject we amended this application conformable to the same applications made for other years, so as to set that question out clearly. The only things I think necessary for us to go into in this examination are the showing of the facts of what we undertake to show:

First, what the correct report would have been if we hadn't labored under this misapprehension that I speak of. By that disclose just what error there was in our report as made. Then show what the additions were that were made to that report in this department;

51 that is, first, as I have said, the M. D. T. stock which we had erroneously included entire, and the department supposed we hadn't included at all; and second, that outside claim. That is really our more important question in the case. That is to say, practically 60 per cent. of our rolling stock, that is in our freight cars and a considerable percentage of our passenger cars, but much smaller, are constantly in the service upon foreign lines and outside of the State. It is not any particular cars that are so used. They are changing every day and every hour of the day, so with something upwards of forty millions worth of rolling stock we have the use ourselves of practically two-fifths of it. That is to say, the other three-fifth-, substantially that, is on foreign roads, and in use by them, and largely in use that we cannot control, if we wanted to, because in the course of business cars are transferred from one company to another without consultation at all with the owning company. In addition to that the company operates what in general terms is known as New York Central System. That includes the Boston and Albany, essentially in Massachusetts; the West Shore and Jersey Junction in New Jersey, and quite a number of roads in Pennsylvania. Our cars are used on all of these lines together. We contend then that instead of all of this entire rolling stock being regarded as assets employed in this State, and hence to be made the basis of computation of the amount of our capital stock employed in the State, that these portions, to wit, the portion which we use on our operated lines in the New York Central System, but outside of New York State, should be deducted, and that the portion used upon foreign lines and outside of New York State should be deducted.

52 J. H. FOULDS, JR., being duly sworn, testified as follows:

By COUNSEL:

Q. Mr. Foulds, state where you reside, please?
A. Where I reside?
Q. Yes?
A. White Plains, New York.
Q. By whom and how are you employed?
A. By the New York Central, in the Auditor's office, assistant to Mr. Meeder, Chief Clerk.
Q. How long have you been engaged there in substantially the same line of service?
A. Since February, 1902.
Q. And what has been the fact in the meantime as to your making or assisting in the making of reports made by the company, or on its behalf, to the State Comptroller for taxation with reference to the capital stock of the company?
A. Well, they have been prepared largely by me personally or under my supervision.
Q. You gave attention to them for the purpose of knowing their accuracy, did you?
A. Yes, sir.
Q. And what is the fact as to whether you have, at my instance, prepared a statement with reference to that report, and the capital stock subject to taxation, a copy of which I now hand you?
A. I prepared this statement in response to your request.
Q. What have you to say as to figures set out in it under the separate headings being or not being corrrect?
A. I believe them to be correct.
Q. The first item upon this paper, to which I have called your attention, Mr. Foulds, total assets, what does that mean?
A. That represents the total assets of the New York Central and Hudson River Railroad, as shown by the balance sheet.
Q. For that year?
A. Of October 31st, 1902.

53 Q. And the item, "average capital stock at par," what does that mean?

A. That represents the result obtained by taking the highest amount of stock outstanding during the year and the lowest amount and averaging. The highest amount outstanding at par and the lowest amount outstanding during the year and averaging according to the number of months in which each was outstanding.
Q. And the item, "average cash value $200,156,525.69," what does that mean?
A. That is the average capital outstanding at par, multiplied by average price of stock during this year.
Q. And the row of figures across the page under the heading "Revised Statement," and with reference to their respective headings under which the figures appear, upon what are the computations based by which the results stated are shown?
A. Those figures under heading of "Revised Statement," those

figures are obtained by taking our report figures and deducting from them the eighty-nine per cent. of M. D. T. stock, which we reported under a misapprehension in total.

Q. And so, then, the figures reading across the page under the words "as per report," they are the figures as the reports show?

A. Those are the figures as per report sent to the Comptroller.

Q. And upon the basis that you computed it then the revised statement amounted merely to the deduction of that eighty-nine per cent. of M. D. T. stock from the amount in report?

A. Yes, sir.

Q. Now, in making these computations as shown under the heading "Revised Statement," you computed as not employed in the state the items in the two lines under the heading "Add Outside Equipment," did you?

A. Yes, sir.

Q. Now state, if you please, with reference to these items under the heading "Outside Equipment," first, is statement "4,780,862.98" under the heading "Assets Employed in New York State,"
54 that is, you mean employed in New York State as the basis of computation of the tax that this office imposed?

A. Yes, sir.

Q. And that $4,780,862.98 is made up how—what is it composed of?

A. It is composed of the value of the equipment arrived at on a basis of car mileage on New York Central system outside the State of New York.

Q. And the item under the same head; that is, under the same general heading but under the subheading "on foreign roads $11,865,528.08," what does that mean and how was it arrived at?

A. That amount is computed upon the basis of car mileage, as representing the use of New York Central cars on foreign lines outside the State of New York.

Q. And the item in the left-hand column, item last but one, $3,593,804.09, was the difference, was it, between the items of assets accounted for in the previous items and the total, which was apparently made the basis of taxation as imposed by this office, as you understand it?

Objected to by Mr. Merrill on the ground that it is a conclusion without any substantiation whatever.

By COUNSEL: I am simply asking him to explain what that one item is making up that total.

By Deputy Comptroller TIMERMAN: I think there should be some proof on which apparent sum is obtained by which you claim we make this taxation.

Objection withdrawn.

A. It was.

By COUNSEL: I offer statement in evidence.

55 By Deputy Comptroller TIMERMAN: Do you offer this statement as proof of the facts contained therein?

By COUNSEL: I offer it with the witness's testimony as part of his testimony.

By Deputy Comptroller TIMERMAN: Merely as explaining his contention?

By COUNSEL: Yes.

By Deputy Comptroller TIMERMAN: And not as proof of the facts contained therein?

By COUNSEL: Except as his testimony as he had given.

By Deputy Comptroller TIMERMAN: That stands for itself.

By COUNSEL: I offer it as part of testimony of the witness.

By Deputy Comptroller TIMERMAN: If it is offered as proofs of facts contained therein, I do not think we can receive it.

By COUNSEL: Only in sense that his testimony is offered as proof.

By Deputy Comptroller TIMERMAN: That stands for itself; now you offer paper in addition to his testimony.

By COUNSEL: Not in addition to it; I offer it as part of his evidence.

By Deputy Comptroller TIMERMAN: For all purposes, without any limitations?

By COUNSEL: As part of his evidence.

By Deputy Comptroller TIMERMAN: Then I do not think I can receive it. I will receive it if it isn't offered as proof of facts, but merely as computation, showing position which you take in these matters.

By COUNSEL: I will proceed with some further questions.

Q. In the course of its business, Mr. Foulds, does the com-
56 pany have reported to it the whereabouts and employment of its equipment from time to time?

A. I don't just understand the question.

Q. Question read by stenographer?

A. It does.

Q. And is memoranda preserved of such report?

A. Yes, sir.

Q. And in making up, or doing what you did with reference to making of the report of the company to this office for the purposes of taxation, did you have access to that data?

A. Not directly.

Q. Well, explain how it was, and from what source you got information?

A. We received the basis upon which the use of cars within and without the State is computed from the office of Superintendent of Freight Transportation, who has charge of such records.

Q. And from the reports which that office made to you, then, you made the computation?

A. Yes, sir.

Q. And what have you to say as to whether the sources of information from which and upon which you acted in the making up of the statement to which I have called your attention, were or were not the same as those which you availed yourself of for purpose of making the report to this department?

A. I believe them to be the same.

Q. What was the total value of the company's equipment for the year 1902?

A. $46,619,097.89.

Q. How much of that was what is known as floating equipment?

A. $1,937,224.27.

Q. And that left as rolling equipment how much?

A. $44,681,873.62.

Q. And what do you say was the amount of this equipment used on foreign roads during that year?

A. The total amount?

Q. In use on foreign roads outside New York State?

A. $11,865,528.08.

Q. Then, how much of this equipment was used on foreign
57 roads in New York State?

A. $1,409,970.40.

Mr. MERRILL:

Q. You mean other than New York Central system in New York State?

By COUNSEL:

Q. The meaning in the last question was roads foreign to New York Central system, but situate within the State of New York; is that the way you understood in answering it?

A. That is the way I understand the use of foreign roads.

Q. And that left, then, the total value of rolling equipment in use in New York Central system, how much?

A. $31,406,375.14.

Q. And of that amount which you have last named, how much was used on the New York Central system, but outside of New York State?

A. $4,780,862.98.

Q. What, then, was the amount of equipment in use in New York State on the New York Central system for that year?

A. $26,625,512.16.

Q. In the making of, or supervising the making of, reports to this department for taxation for the year ending October 31st, 1902, then what items of assets and amounts of each of this equipment did you count as constituting assets which should be considered in computing the amount of capital stock subject to taxation for that year?

A. The value of equipment in use in New York State on New York Central system, $26,625,512.16; on foreign roads, $1,409,970.40; floating equipment, $1,937,224.27.

Q. And that made the amount of these assets in the way of equipment to enter into basis of taxation, a total of what?

A. $29,972,706.83.

Q. In the business and operations of the New York Central and Hudson River Railroad Company, is there or is there not what is recognized as the New York Central System?

A. There is.

58 Q. And what does that include?

A. Includes the New York Central and Hudson River Railroad.

Q. In a general way?

A. And its leased and operated lines.

Q. That is, all lines operated directly by New York Central and Hudson River Railroad Company?

A. Yes, sir.

Q. And those lines are situated in what State?

A. New York, Massachusetts, Pennsylvania and New Jersey.

Q. What is the fact as to its operated roads outside of New York State as to whether they are all or approximately all operated under leases?

A. I believe they are all operated under lease.

Q. In some instances trackage rights where this company and another or other companies operate over same rails?

A. In addition to leased lines we hold some trackage rights over other lines.

Q. What have you to say as to whether the memorandum here submitted to you sets forth correctly the leases under which this company operate the lines therein mentioned during the tax year in question, and as to the respective companies having been incorporated by those respective States as of the dates set forth?

A. To the best of my knowledge and belief the record is correct.

Q. And what is the fact as to these respective leases requiring the lessee company to pay all taxes upon the leased property as a part of its rental?

A. To the best of my knowledge and belief that is correct. Memorandum of lines operated by N. Y. C. as a part of its system in the states named:

Massachusetts:

Boston & Albany, incorporated January 10, 1871, by consolidation of numerous roads.

Leased November 15, 1899.

59 New Jersey:

West Shore Railroad, incorporated (reorganization) December 5, 1885.

Leased December 5, 1885.

Hoboken & Hudson River Turnpike Co. (Bull's Ferry to Hoboken), incorporated March 16, 1857; merged in New York and Bull's Ferry Railroad Company (Bull's Ferry to Jersey City), incorporated March 14, 1861; name changed to New York and Ft. Lee Railroad Company March 9, 1862.

Leased June, 30, 1886.

Hoboken Land & Improvement Company (Weehawken southerly to other railroads), incorporated March 8, 1860.

Leased March 1, 1886.

New Jersey Junction Railroad Company (Township of Union to Jersey City), incorporated February 27, 1886.

Leased July 1, 1886.

New Jersey Shore Line Railroad Company (Township of Union, Hudson County, to Town of Harrington, Bergen County), incorporated March 2, 1886.

Stock owned by N. Y. C.

Pennsylvania:

Dunkirk, Allegheny Valley and Pittsburgh, incorporated (consolidation), December 31, 1872.

Leased January 3, 1873.

Jersey Shore, Pine Creek and Buffalo (Jersey Shore to Port Allegheny, McKean County), incorporated February 17, 1870; name changed to Pine Creek Railway Company February 13, 1884.

Leased May 1, 1899.

Beech Creek Extension Railroad Company, incorporated (consolidation) March 30, 1891.

Leased May 22, 1901.

60 Clearfield Southern Railroad Company, incorporated July 6, 1898; certificate amended October 26, 1903.

Leased October 1, 1903.

Syracuse, Geneva & Corning, incorporated (consolidation) November 2, 1885.

Leased May 1, 1899.

Curwensville & Bower, incorporated March 31, 1903.

Leased March 31, 1903.

Pittsburgh & Eastern, incorporated (consolidation) November 16, 1896.

Agreement for operation, December 27, 1899.

Leased February 24, 1904.

Corning, Cowanesque & Antrim, incorporated (consolidation) January 2, 1873; name changed to Fall Brook Railway Company July 1, 1892.

Leased May 1, 1899.

Beech Creek Railroad Company, incorporated June 30, 1886 (reorganization).

Leased October 1, 1890. Cambria County Railroad Company, incorporated August 31, 1896; consolidated with Beech Creek Railroad Company under name of Beech Creek Railroad Company, May 11th, 1898.

Statement headed "New York Central Capital Stock Tax 1902" marked "Exhibit A for identification."

By COUNSEL:

Q. Mr. Foulds, the statement marked "Exhibit A for identification," do you identify that as the one to which your attention was directed and concerning which you gave various respective answers in your previous testimony?

A. I do.

By COUNSEL: I now offer this statement in evidence as a part of the testimony of the witness.

61 Mr. MERRILL: I object to so much of it as is a conclusion.

Deputy Comptroller TIMERMAN: I think that part I will have to sustain.

Exception taken.

By Mr. MERRILL:

Q. Mr. Foulds, what balance sheet did you take this total statement of assets from?

A. Balance sheet of New York Central and Hudson River Railroad Company in the auditor's office.

Q. Does this statement of assets include the original cost of these assets?

A. I believe they do in all cases.

Q. Without deduction?

A. Without deduction.

Q. In arriving at the average amount of the capital stock issued and outstanding during the year ending October 31st, 1902, you did not take, as I understand you, the amount outstanding on November 1st, 1901, and then by determining the number of days that the several shares of stock issued in addition thereof were outstanding, obtained the average in that way?

A. Well, we obtained it by taking the number of months that a certain amount was outstanding and the number of months that another amount was outstanding, adding the two together and dividing it by twelve.

Q. Will the books of the company show the dates of issue of these several amounts of capital stock?

A. They will.

Mr. MERRILL: The Comptroller asks you to furnish a statement of the several dates when capital stock was issued, and the amounts issued on the several dates of the capital stock of the New York Central and Hudson River Railroad during the year ending October 31st, 1902.

62 Q. In the testimony which you have given in relation to equipment outside of the State of New York, do you know, or has there been any computation made which would show whether or not any of the equipment of the New York Central and Hudson River Railroad Company was used continuously and exclusively without the State of New York?

A. So far as I am aware there is not.

Q. None of it?

A. As far as I am aware there has been no such computation in connection with this report.

Q. Do you know whether there is any such equipment which is used continuously and exclusively without the State?

A. I do not.

Q. Do the figures which were furnished you show any such thing?

A. They do not.

Mr. MERRILL: The Comptroller will ask you to furnish a statement of all equipment of the New York Central and Hudson River Railroad Company used continuously and exclusively without the State of New York.

By COUNSEL: It is admitted that there is no substantial amount of the equipment of the New York Central and Hudson River Rail-

road Company that was used permanently, continuously or exclusively without the State during the entire tax year in question.

By Mr. MERRILL:

Q. In the computation which was made Mr. Foulds, based on mileage without and within the State that might be so made as to include a great many hundred miles of car mileage for one car and very little car mileage for another, might it not without regards of property value of the car itself?

A. I believe that it might.

Q. For instance, if a carload of goods of any description should be shipped in one car from New York to San Francisco, in
63 such a determination as that the wheelage of that one car might be very large, larger than the wheelage of a half dozen or more cars employed constantly within the State of New York, might it not?

A. It might.

Q. What was the total value of the equipment of the New York Central and Hudson River Railroad Company during the year ending October 31st, 1902, on the average?

A. In round figures?

Q. You know, exactly, don't you?

A. $46,619,097.89.

Q. That was the cost of that equipment, was it?

A. That is the amount charged on the ledgers.

Q. As the cost?

A. As the cost of that equipment.

Q. Now, what was the amount of the stock of the Merchant's Despatch Transportation Company which you claim was employed in the State of New York, and the property of the New York Central and Hudson River Railroad Company?

A. Eleven per cent. That eleven per cent. means eleven per cent. of the amount owned by the New York Central.

Q. Mr. Foulds, you have testified that upon the figures supplied you by the Auditor's Department of the New York Central and Hudson River Railroad Company, the percentage of the stock of the Merchant's Despatch Transportation Company, owned by the New York Central and Hudson River Railroad Company and employed in New York State, was eleven per cent.?

A. Yes, sir.

Q. Have you any knowledge as to how that basis was arrived at?

A. I have not.

Mr. MERRILL: Well, the Comptroller desires to submit a copy of the determination made by this department with relation to the portion of capital stock of the Merchant's Despatch Transportation Company employed in conducting its business in this State,
64 after a hearing held before Deputy Comptroller Timerman on May 4th, 1904, for the year ending October 31st, 1903, and the amount of capital stock outstanding for that year being the same as it was heretofore.

By COUNSEL: I object to it on the ground that it is immaterial and irrelevant.

Mr. MERRILL: It is material, because it shows more than three times the amount the New York Central claims was employed here.

Deputy Comptroller TIMERMAN: As I understand it, this inquiry here doesn't cover any period of any tax that was determined in this proceeding of May 4th.

Mr. MERRILL: No, but the same amount of capital stock was outstanding in the Merchant's Despatch Transportation Company in both years, so that the percentage employed here would be the same for both periods.

Objection sustained.

By Mr. MERRILL:

Q. Mr. Foulds, is there anything in the possession of the New York Central and Hudson River Railroad Company, either upon their books or otherwise, that would show conclusively the amount of the capital stock of the Merchant's Despatch Transportation Company used and employed in the State of New York during the year ending October 31st, 1902?

A. I don't believe there is.

Mr. MERRILL: The Comptroller asks that the New York Central and Hudson River Railroad Company produce at this office a witness or witnesses who are competent to testify as to the portion of the capital stock of the Merchant's Despatch Transportation Company employed in doing business in this State during the year ending
65 October 31st, 1902. Will the company produce it?

By COUNSEL: I don't know; if we don't we cannot get the benefit of it.

By Mr. MERRILL:

Q. Have you any knowledge as to how this eleven per cent. basis was arrived at?

A. I have not.

Q. Mr. Foulds, is there any legal entity by the name of the New York Central System?

A. I do not think there is.

Q. Don't you know that there isn't?

A. Yes, sir.

Q. You simply use that term relatively to cover lines leased by the New York Central and Hudson River Railroad Company, over which it operates its cars?

A. Yes, sir.

Q. Over which it operates owned and leased lines?

A. Yes, sir.

Q. Is it or is it not a fact that the New York Central Company operates the cars of other companies over its own and leased lines?

Objected to by Mr. Emery, on the ground that it is irrelevant and immaterial. The tax here is on our capital; it is the employment of our capital in this State, and an unjust tax on our capital is not

to be excused by showing that the law might make us liable for taxation on some other body's capital.

Deputy Comptroller TIMERMAN: While that might be true, Mr. Emery, I think I will receive the answer to this question, merely as part of the cross-examination.

Exception taken.

A. It does receive cars from other companies.

Q. Is that true with relation to their equipment, too?

Same objection, same ruling. Exception taken.

66 A. I believe not.

Q. Doesn't apply to locomotives and other equipment besides cars?

A. I should say not.

Q. When a car starts from the City of New York and travels westward over the lines of the New York Central Railroad Company and other railroad companies to California, and is then returned either empty or loaded with freight, does that car as property become the subject of taxation elsewhere than in the State of New York?

Objected to by Mr. Emery as incompetent, irrelevant and immaterial.

Mr. MERRILL: I show, Mr. Comptroller, that this property has its *situs* in the State of New York and nowhere else.

Objection overruled. Exception taken.

A. I do not know.

Q. Where does the ownership of the railroad of the New York Central and Hudson River Railroad Company end at its eastern (western) terminal?

A. City of Buffalo.

Q. Does the New York Central and Hudson River Railroad Company, as a railroad company, operate west of the City of Buffalo?

A. It does not—some little points beyond, between Black Rock, or something of that kind.

Q. None beyond the State of New York?

A. No, that is what I understood you to say.

Q. Then Mr. Foulds, when you have figured the car wheelage, mileage west of Buffalo, you have been figuring the business conducted by some other railroad company than the New York Central Railroad Company, have you not?

A. We have.

Q. What is the par value of the ownership of the New York Central and Hudson River Railroad Company in the stock of the

67 Merchant's Despatch Transportation Company?

A. I couldn't say from memory—$2,597,400.00.

Q. Does that item of ownership, or a portion of it, appear in the $109,669,172.12 reported to the Comptroller as stocks of other companies outside the State of New York?

A. Does not.

Q. Where does it appear in this report?

A. Appears in the column headed "in the State of New York."

Q. The entire amount appears in there, does it?
A. It does.
Q. What is this "outside State of New York" amount made up of?
A. In the ownership of companies outside the State of New York.
Q. What companies?
A. Lake Shore and Michigan Southern, Michigan Central and other companies.
Q. Now, the cost of the road and equipment, excluding only that equipment which you claim was employed outside the State of New York was $174,618,395.45, was it not?
A. It was.
Q. In addition to that the company has claimed that this equipment, which it is admitted was practically none of it exclusively and continuously employed outside the State of New York, was $16,646,391.06, was it not?
A. It was.
Q. Now, under the head of "In State of New York" lessor companies, what does the term "lessor companies" mean?
A. It means money advanced or expended upon the roads of lessor companies of the New York Central, leased lines.
Q. And did the New York Central and Hudson River Railroad Company advance these moneys upon notes?
A. Not to my knowledge.
Q. How were they advanced generally?
A. Amounts spent upon the property by the New York Central.
Q. And had the New York Central no means of the re-
68 covery of the amount so expended?
A. Not in all cases.
Q. Well, how about a vast majority of the cases?
A. I should say to some extent they would have means.
Q. What did the New York Central and Hudson River Railroad Company have to show for such advances?
A. Nothing but the charge against the line, against the road.
Q. Charge against the road upon its books of account?
A. Yes.
Q. Well, then these two amounts, Mr. Foulds, $6,044,757.71 and $2,283,128.03 represent investments made upon leased line by the New York Central and Hudson River Railroad Company within and without the state respectively?
A. Yes, sir.
Q. And in the report rendered to Comptroller for the year ending October 31st, 1902, in the item of $16,499,270.65, stocks of other companies in the State of New York, you included the entire ownership of the New York Central and Hudson River Railroad Company in the stock of the Merchant's Despatch Transportation Company?
A. We did.
Q. In the statement of $109,669,172.12, stocks of other companies outside the State of New York, did you include in that the percentage of the stocks of those companies employed in doing business in the State of New York; for instance, as in the case of the Lake Shore and Michigan Southern Railway Company, did you include

a portion of their capital stock in which you had an ownership as being employed in this state, or not?

A. We did not. The capital stock of the Lake Shore and Michigan Southern Railway owned by the New York Central was divided upon the basis of the amount of road mileage of the Lake
69 Shore in the State of New York compared with the total road mileage of the Lake Shore Railroad.

Q. Now, Mr. Foulds, the items of cash and cash assets, ownership in other lines, real estate, etc., fuel and supplies, bonds bought for account sinking fund and abolition of grade crossing suspense account, all of them were correct as in the original return, were they not?

A. I believe they were, that is right.

F. E. WILLIAMSON, being duly sworn, testified as follows:

By COUNSEL: Where do you reside Mr. Williamson, and how and where are you employed?

A. I reside in New York City, and am employed as chief clerk to the Superintendent of Freight Transportation of the New York Central Railroad.

Q. How long have you been employed by the company and in what line of service?

A. I have been in the employ of the company about seven years, working in various capacities in the freight service in the Division Superintendent's office and later on in the office of the Superintendent of Freight Transportation.

Q. How long have you been in that office?

A. About a year and a half.

Q. Have your duties there made you familiar with the method of reporting the whereabouts of cars and the companies in whose service they are and change of hands from one company to another?

A. They have.

Q. And with the data that is received and kept by the company concerning those deliveries?

A. They have.

Q. Mr. Williamson, have you, at my request, prepared a record of some several car movements of cars off the lines, or to and
70 from and off of the lines of the company?

A. Yes, these were prepared under my direction.

Q. And prepared from the data that you speak of in the possession of the company?

A. Yes, from the original record.

Q. And what you have to say as to their being correctly transcribed from the record?

A. I believe them to be correct.

Q. For instance, car number 31,772, from Schenectady to Clearwater, South Carolina, that means, does it, that the car left the company's line at Schenectady on the 6th of March, 1902?

A. No, sir, the car was loaded at Schenectady for Clearwater, South Carolina, via Canandaigua—left our line at Canandaigua.

Q. On the 8th of March?

A. Yes, sir.

Q. And when did that car come back to the possession of the New York Central Company?

A. Was returned to us on July 2d of the same year.

Q. By what company?

A. By the Erie.

By COUNSEL: Without examining into detail each of these, I offer this in evidence.

Objected to by Mr. Merrill, for the reason that it does not show the fact that any of the equipment of the New York Central and Hudson River Railroad Company was continuously and exclusively employed during the year in question outside the State by any company, corporation or individual, nor does it show the fact that the New York Central and Hudson River Railroad Company did any business with such equipment outside the State of New York.

By COUNSEL: Of course, it is of no consequence whether we did business with it, or somebody else did business with it. We
71 offer it for the purpose of showing the general course of business by which our cars left our lines.

Objection overruled.

Received and marked "Exhibit B."

By COUNSEL: I desire also to offer in evidence the same record of car movements that were received in the other case.

Deputy Comptroller TIMERMAN: Is this offered for the purpose of proving that these cars were operated exclusively outside the State of New York, or that they were operated at all outside the State of New York by the New York Central Company?

By COUNSEL: No.

Deputy Comptroller TIMERMAN: Inasmuch as it isn't claimed that these exhibits will prove either of those facts, and as matter of fact it isn't claimed, I suppose that that really was the fact?

By COUNSEL: No, our cars are going to and from us and back and forth between other people daily and hourly.

By Deputy Comptroller TIMERMAN: Then it will be received. Marked "Exhibit B-1."

By COUNSEL: Now, I offer record of car movements as contained in papers on appeal from order, proceedings 1900, in case in the Court of Appeals, pages 53 to 59 inclusive.

Received subject to the same limitations.

Marked "Exhibit C."

Q. Calling your attention, Mr. Williamson, to the record of movements of car 41,278, as shown on page 53, of the Court of Appeals case, tax 1900, state, if you please, where that car was destined to when it left the company's line?

A. You ask me New York Central 41,278, where it was destined?

Q. Yes?

A. Detroit, Michigan.

72 Q. Car number 41,038, where was it destined to?

A. I have no destination on that.

Q. Car number 59,578?

A. Destined Chicago, Illinois.
Q. Car number 63,158?
A. Chicago, Illinois.
Q. Car number 18,236, where was it destined to?
A. Grand Rapids, Michigan.
Q. Car number 63,123?
A. Cleveland Transfer, Ohio.
Q. Car number 63,176?
A. Edison, Ohio.
Q. Car 64,431?
A. Chicago, Ill.
Q. Car number 61,831?
A. San Francisco, California.
Q. Car number 14,035?
A. Delivered Lake Shore, December 20th, 1901.
Q. Car number 27,941?
A. Joliet, Illinois.

Q. Now what do you say as to dates of year in which those cars left the company's possession?

A. All these movements were made in 1902, with the exception of car New York Central, 14,035, which was delivered to the L. S. & M. S. at East Buffalo, December 20th, 1901.

Q. What do you say, Mr. Williamson, as to whether the car movements as recorded in the records to which your attention has been called are or are not fairly illustrative of the general course of business in the handling of the company's freight cars?

A. The cases cited are fairly illustrative.

Q. State to the Comptroller what the general or uniform custom is, if there is such, with reference to general service freight cars, as to their return when they have reached the destination for which they left the possession of the owning company?

A. It is not the common practice to return cars empty—they are ordinarily used for loading either at the point at which made empty, or some adjacent point, and worked home in that way.

Q. And who determines about how these cars shall be used
73 when thus in the hands of a company other than the owner?

A. There are certain general rules for the handling of foreign equipment, but as it works out practically the control of the cars is entirely in the hands of the line upon which they are located.

Q. The company has for the time the possession of them?

A. Exactly.

Q. By what method is the owning company advised when its cars pass from the possession of one foreign company to another?

A. It is the practice of practically all of the railroads of the United States to report delivery of cars to owners; that is, when one road turns over a car to another they report to owner of that car the date of delivery and the line to which delivered.

Q. To illustrate, is this fairly illustrative of what you mean—if a car of the New York Central was in the possession of the Canadian Pacific and that company had lading for point on Oregon Short Line, and should load the car and transfer it to the Oregon Short

Line Company in the ordinary course of business the Canadian Pacific would at once report that delivery to the New York Central?

A. They would.

Q. And in turn, as the Oregon Short Line would in the course of transportation, or otherwise, deliver that car to another company—for instance, the Union Pacific—the Oregon Short Line would report that delivery to the New York Central?

A. They would, provided it was a New York Central car.

Q. What are the customary methods, if there are such, that the owning company resorts to or avails itself of as a means of insuring delivery back to it of its cars in the hands of other companies; that is to say, is there a recognized time at which they have a right to
74 demand such return, and if so what is it and what are the methods of enforcing compliance with it?

A. As a general rule, the railroad companies rely upon the so-called per diem charge to effect return of their cars, or at least movement of them, this charge being twenty cents per car per day up to thirty days; but the owning line has a right to serve a penalty notice on any road which holds a car over twenty days, and if the car is not delivered off the line on which this penalty notice is served in the next ten days, the holding road then becomes responsible for a penalty rate on that car of one dollar per day.

Q. That is, eighty cents in addition to twenty?

A. In addition to twenty.

Q. And how is this notice given?

A. Given by the prescribed printed form under the rule of the American Railway Association.

Q. And how generally are these rules or customs that you have spoken of observed by the railroads of the country?

A. They are very generally observed.

Q. You have spoken of the charge per diem for cars held by companies other than the owning company,—how long has that been the method of charge for such cars?

A. Since July 1st, 1902.

Q. And prior to that time what was the basis of charge?

A. Prior to that time the basis of charge was mileage made at agreed rates.

Q. And what was the customary form of reporting that mileage made—was it in such form as to give specific numbers of cars, or merely a lump for mileage stated as the mileage made of cars of the owning company upon the reporting company's road for a given time?

A. It was the practice to report a lump sum representing the mileage of certain company's cars each month, but at the re-
75 quest of the owning companies in some cases the mileage of certain series of cars was given separately if it was so desired, but in a lump sum not individual car numbers.

Q. Where this report of the mileage of certain series of cars was made separately, as you have stated, what was the occasion for that?

A. It might be that a certain line of stock cars were under lease

or some special arrangement in connection with a certain series of cars.

Q. By which do you mean it became necessary for the lessee company to know just what mileage those cars was to be reported to them?

A. Exactly.

Q. What is the usual custom with reference to coal cars, particularly with them in this respect, different from general service freight cars, as to their being returned empty?

A. Well, coal cars, of course, as a general proposition, are wanted at the mines for loading, so those cars are not used in the same general way that box cars are, but they are returned for loading either on the rails of ow-ing road, or some coal connection.

Q. In what State are the coal cars of the New York Central operated by it loaded?

A. Principally in Pennsylvania.

Q. What is the fact as to whether a considerable percentage of the cars of this company loaded upon or adjacent to its Pennsylvania lines pass at Newburry Junction from the lines of this company to other lines and thus on to their destination without going in the State of New York at all?

A. I cannot give a percentage figure, but certainly a very large number of cars are so handled.

Q. Carrying coal to tidewater via routes other than the Central Company's routes from Newburry Junction?

76 A. Or to points on southern lines other than tide.

Q. Are you able to state approximately the percentage of this company's cars, freight cars, which were used off of its lines during the tax year in question, ending October 31st, 1902?

A. My recollection is something over sixty per cent.

By Mr. MERRILL:

Q. Mr. Williamson, what do you mean when you say that sixty per cent. of freight cars of the New York Central and Hudson River Railroad Company are used outside the State of New York?

A. I mean that if at any time you were to make a count of the freight cars of the New York Central and dividing them, those in the State and those out, that out of every hundred cars you would find about sixty outside the State of New York; that condition would be generally true.

Q. That is, that during the year sixty per cent. of their equipment would be off outside the State all the time?

A. Yes, sir.

Q. Well, you don't mean to say that sixty per cent. of equipment of the New York Central and Hudson River Railroad Company is continuously and exclusively outside the State of New York?

A. I don't mean to say that any particular car is continuously and exclusively outside the State of New York, but I mean to say that on an average about sixty per cent. of total equipment is outside the State of New York.

Q. Relatively what part of equipment of people in connection with

whom they do transportation business is in the State of New York, in hands of New York Central and Hudson River Railroad Company, to take place of this other equipment?

77 Objected to by counsel, on the grounds that it is incompetent, irrelevant and immaterial.

Objection overruled; exception taken.

A. Well, I can't say as to that.

Q. Well, is it not a fact that there is a great deal of such equipment here upon the lines of New York Central Railroad Company at all times?

Same objection; same ruling; exception.

A. It is a fact that we handle a considerable number of foreign cars at all times.

Deputy Comptroller TIMERMAN: I will ask to have you furnished a statement of the cars of outside railroads that are on this road, on the New York Central lines in place of this last answer, in which you state you couldn't definitely answer the question.

Counsel answers for the witness that the company will undertake to furnish such information, if practicable to obtain it, but objects to the subject matter called for by the question, objects to it being received in evidence on the ground that it is incompetent, irrelevant and immaterial to the questions here under consideration.

Objection overruled; exception.

Deputy Comptroller TIMERMAN: I would also like to ask for a copy of the rules you mention that govern this subject between railroads?

By COUNSEL: Yes, sir.

By COUNSEL: Now, I wish to offer in evidence the Constitution of Massachusetts, Part 2, Chap. 1, Sect. 1, Art. 4; also the statutes of Massachusetts, Chapter 13, entitled "The Taxation of Corporations" and the "Taxation of Corporate Franchises." That is

78 to say, on page 128, Public Statutes of Massachusetts, of 1882, page 128, is where this chapter begins and has this title. Now, on page 138, under the subject entitled "Taxation of Corporate Franchises" section 38, on page 139 of the same volume, section 39 and section 40 on page 140 of the same volume, section 42 on page 142 of the same volume, sections 53 and 54 on page 143, section 56 on page 144, sections 60, 61, 62; also acts and resolves passed by the general Court of Massachusetts in the year 1900 in volume entitled that, at page 464, Chapter 468, "An Act to authorize the lease of the Boston and Albany Railroad to the New York Central and Hudson River Railroad Company, sections 1 and 11 of that act.

The above received and marked "Exhibit C-1 for identification."

By COUNSEL: I offer in evidence also the decision of the Supreme Judicial Court of Massachusetts, Attorney-General against Bay State Mining Company, 99 Mass. 148. I also offer in evidence the decision of the case, first, in the Circuit Court, I am not able to give volume of it now—that is, United States Circuit Court, and the review of that decision in the Supreme Court of the case of the West-

ern Union Telegraph Company against Massachusetts, reported in 125 U. S. 530.

By Mr. MERRILL: I object to the admission of this as testimony on the ground that it is immaterial, irrelevant and incompetent, and has no bearing whatever upon the tax laws of the State of
79 New York, or the operation of such tax laws. That the laws of Masaschusetts or any other State cannot reach over into and operate under the laws of the State of New York, because such an operation would make their laws extra-territorial.

Deputy Comptroller TIMERMAN: These portions of the Constitution, also the statutes and the decisions, I presume, not having read them, refer to the taxation of franchises in the State of Massachusetts?

By COUNSEL: Yes; that is, they include that. The franchise is not taxed separately as it is here; it is included in the bulk valuation.

By Deputy Comptroller TIMERMAN: Now, do you expect to offer proof of paying franchise tax pursuant to those laws of Massachusetts?

By COUNSEL: It was conceded that our leases require us to pay a tax on leased property, and that includes franchise.

By Deputy Comptroller TIMERMAN: Of course, if you expect to prove payment of a tax, of course, with that agreement I might receive them, but if there is to be nothing offered here on that subject I do not see how the bare laws would be material.

By COUNSEL: I offer the laws themselves for the very purpose of showing what tax they provide for.

By Deputy Comptroller TIMERMAN: The mere provision for the tax I would be inclined to hold as immaterial, unless you agree to state that you expect to supplement it by proof of the actual
80 imposition of the franchise tax and the collection thereof.

By COUNSEL: I could do that, but haven't provided myself with it.

The last offer received and marked "Exhibit C-1, for identification."

By Deputy Comptroller TIMERMAN: The sections of the Constitution and the statutes, together with the decisions, are excluded for the time being. I reserve the right, however, to receive them if later in the testimony it appears that a tax was actually paid on the franchise of the New York Central and Hudson River Railroad Company, pursuant to these laws.

Exception taken to the exclusion.

By COUNSEL: I now offer the following laws of the State of New Jersey: General Public Laws of 1888, pages 269 to 287, being Chapter 208, entitled "An act to revise and amend 'An Act for the taxation of railroad and canal property,' approved April tenth, one thousand eight hundred and eighty-four." Also General Public Laws of 1888, pages 376, 377, being Chapter 259, entitled "An Act to amend an act entitled "An act to revise and amend 'An act for the (taxation) of railroad and canal property,' approved April tenth, one thousand eight hundred and eighty-four, which was approved

March twenty-seventh, one thousand eight hundred and eighty-eight." Also General Public Laws of 1891, pages 165, 166, being Chapter 98, entitled "A Supplement to an act entitled "An act to revise and amend 'An act for the taxation of railroad and
81 canal property,' approved April tenth, one thousand eight hundred and eighty-four, approved March twenty-seventh, one thousand eight hundred and eighty-eight."

Same objection. Same ruling. Same exception.

Same received and marked "Exhibit D, for identification."

By COUNSEL: I now offer in evidence the Laws of the Commonwealth of Pennsylvania, Session of 1889, Number 332, page 420, entitled "A further supplement to an act entitled 'An act to provide revenue by taxation,' approved the seventh day of June Anno Domini one thousand eight hundred and seventy-nine," page 427, section 19. Also of the session of 1891, number 200, page 229, entitled "An act to provide, etc." At page 233, Section 4 and following, setting forth Section 20 of the act as amended. Also, the same State, session of 1893, number 288, page 353, the title of the act and section 1, setting forth section 21 of the former act as therein amended. Also, session of 1889, number 332, at page 431, section 23, same session laws, page 437, section 31.

Same ruling. Same objection. Exception.

Marked "Exhibit E, for identification."

By COUNSEL: Now, I offer in evidence the decisions of the Courts of Pennsylvania, as follows:

Commonwealth against Susquehanna & Schuylkill R. R. Co., 14 C. C., 440.

Pullman Palace Car Company against Commonwealth, 107 Pa. State, 156 and 141 U. S., 114.

82 Also Commonwealth against D., L. & W. R. R. Company, 145 Pa., 96.

Commonwealth against N. Y., P. & O. R. R. Co., 188 Pa., 169.

Same objection. Same ruling. Exception.

Marked "Exhibit F, for identification."

It is agreed that the evidence offered and the rulings with reference thereto in the proceeding regarding the tax for the year ending October 31st, 1902, shall be regarded and dealt with in the same manner with reference to the proceeding for the tax year ending October 31st, 1903, except so far as regards the evidence with reference to the particular amounts for that year, and except the evidence with regard to the M. D. T. stock, and that subject only to the exception noted in all respects, the same evidence may be regarded as having been offered and dealt with in this proceeding as it was in proceeding for 1902.

It is further stipulated that the figures under the heading "Recapitulation of Distribution of Assets," October 31st, 1903, as shown on the back of the original report herein, shall be accepted as correct, subject only to these exceptions, namely:

First, the figures under the heading "In New York State" as "stocks of other companies," $16,552,269.97, should be reduced by deducting therefrom 63.54 per cent. of $2,597,400.

Second, that of the item under "Outside New York" as "Cost of road and equipment, $19,817,142.24," of this amount $414,540.86 represents an investment outside of New York State other
83 than equipment, the balance, to wit, $19,402,601.38, represents equipment, upon which the applicant claims exemption from the basis of taxation upon the grounds set up by the testimony in the 1902 proceeding, to wit, that $3,148,216.64 thereof represents the average value of equipment employed by the railroad company on its operated lines outside the State of New York, and the other $16,254,384.74 represents the average value of its equipment used on foreign roads outside the State of New York during the said tax year, as testified to in the 1902 proceedings.

It is the same stipulation for 1904 as for 1903, except where you come to accepting that under the head of "Recapitulation of Distribution of assets October 31st, 1904," the item "Cost of equipment outside the State of New York, $19,960,789.08," consists exclusively of equipment, and that the testimony with reference to the same shall be to the effect that $3,513,619.12 was employed on roads operated by the New York Central and Hudson River Railroad Company outside of the State of New York, and $16,447,169.96 thereof was the average of its cars in the use of foreign corporations outside of the State of New York during the said tax year, as indicated in the testimony with relation to the same ground or matter in the proceedings of 1902.

Papers showing car movements in the year ending October 31st, 1904, offered in evidence.

Received and marked "Exhibit G."

By Mr. MERRILL: Is it admitted by counsel for the com-
84 pany that the New York Central and Hudson River Railroad Company is a railroad corporation, transportation company, organized under the laws of the State of New York, and under the laws of no other State?

By COUNSEL: My application says a railroad corporation, incorporated under the laws of no other State.

By Deputy Comptroller TIMERMAN:

Q. As a transportation corporation?

By COUNSEL: Surely.

85 EXHIBITS.

The following, signed by James H. Foulds, Jr., and Frederick Ely Williamson, was furnished in response to inquiry, to wit:

"The Comptroller asks you to furnish a statement of the several dates when the capital stock was issued, and the amounts issued on the several dates of the capital stock of the New York Central and Hudson River Railroad Company, during the year ending October 31st, 1902," and as and for his answer thereto says that the dates of issue of the increase of capital stock of said company during the year ended October 31, 1902, was as follows:

Date issued.	No. of shares.	Date issued.	No. of shares.
April 21st	3,835	Brought forward	168,539
" 22d	3,981	May 27th	24
" 23d	5,659	" 28th	43
" 24th	4,798	" 29th	18
" 25th	5,232	" 31st	10
" 26th	3,799	June 2d	40
" 28th	11,559	" 3d	14
" 29th	7,267	" 4th	61
" 30th	6,451	" 5th	16
May 1st	7,926	" 6th	13
" 2d	19,897	" 7th	9
" 3d	1,230	" 9th	15
" 5th	1,657	" 10th	15
" 6th	2,170	" 11th	9
" 7th	3,520	" 12th	19
" 8th	2,896	" 13th	36
" 9th	12,514	" 14th	6
" 10th	7,585	" 16th	15
" 12th	53,492	" 17th	10
May 13th	1,130	" 18th	35
86 " 14th	137	May 19th	29
" 15th	125	" 20th	11
May 16th	587	" 21st	6
" 17th	38	" 23d	5
" 19th	95	" 24th	41
" 20th	348	" 25th	5
" 21st	406	" 26th	13
" 22d	34	" 27th	20
" 23d	51	" 30th	52
" 24th	18	July 23d	34
" 26th	102		
	168,539	Total	169,163

In response to the inquiry, to wit:

"I will ask to have you furnish a statement of the cars of outside railroads that are on this road, on the New York Central lines, in place of this last answer, in which you said you couldn't definitely answer the question," and as for his answer thereto says:

Our system of car records and accounts does not embrace accounts of foreign cars in the aggregate which may be employed upon our line. It consists of or includes individual car movements and car mileage in the aggregate. Computation of the estimated number of cars thus employed based on the mileage made on our line would indicate that while the number varies very much at different seasons of the year, the average number of foreign cars employed on the New York Central's operated lines within the State of New York during these respective tax years ending October 31st, 1902, 1903

and 1904, were approximately equivalent to the number of
87 this company's cars operated on foreign lines outside the State during each of such tax years.

And in response to the inquiry, to wit:

"I would also like to ask for a copy of the rules you mentioned that cover this subject between railroads, and for his answer thereto says: The paper hereto attached marked "Exhibit 1," is a correct and complete copy of the rules mentioned.

88 EXHIBIT 1.

The American Railway Association.

CODE OF
CAR SERVICE RULES
AND
CODE OF
PER DIEM RULES
GOVERNING SETTLEMENT FOR THE USE OF
FREIGHT CARS.

CODE OF
CAR SERVICE RULES
ADOPTED OCTOBER 24, 1900;
WITH AMENDMENTS AGREED TO APRIL 24, 1901,
OCTOBER 23, 1901, OCTOBER 28, 1903,
AND APRIL 5, 1905.

7 RULES.

Foreign cars must be promptly returned to the home roads.*

2. Foreign cars may be properly used as follows:

(*a*) Loaded to points on or reached by using the home road.

(*b*) Loaded to intermediate points in the direction of the junctions at which they were received.

(*c*) If returned empty they should be moved over the routes by which they were received.

89 3. Foreign cars may be sent empty in the direction opposite to the junctions at which they were received, for loads to points on or reached by using the home roads, but not otherwise.

Foreign cars must not be sent empty to connecting roads without the permission of the owners, except for switching service. Loaded or empty cars received for switching service must be confined to switching limits, and returned to the home or the delivering road.

When empty foreign cars are delivered by one line to a connection

*NOTE.—Whenever the words "home road" are used in these rules they refer to "The road which owns a car, or upon which the home of a private car is located."

for return loading via the road making the delivery, they must be so loaded and returned.

Rule 3. See page 12.

4. If loaded foreign cars on their return movements are re-consigned and such reconsignments would cause diversions of the cars, the lading must be transferred under the rules governing transfers at points of diversion, if this can be done without injury to it, and the cars must be returned to the owners or to the roads from which they were received. In case the lading is of such a character that it cannot be transferred without injury the cars may be run through as re-consigned, but the facts of the case must be promptly reported to the owners of the cars.

5. Cars shall be considered as having been delivered to a connecting railroad when placed upon the track agreed upon and designated as the interchange track for such deliveries, accompanied or preceded by proper data for forwarding and accepted by the car inspector of the receiving road.

Unless otherwise arranged between the roads concerned, the receiving road shall be responsible for the cars, contents and Per Diem after receipt of the proper data for forwarding and until they have been accepted by its inspector or returned to the delivering road.

6. The following rates per train mile, of actual distance for any trains using other lines in avoiding washouts or other obstructions, shall be in force unless otherwise arranged between the roads concerned:

Fifty cents per train mile for either a passenger or a freight train handled by its own engine and crew, together with the actual cost of pilotage, and with fuel and incidental supplies, at cost plus ten per cent., and water at fifty cents per tank; in case the engine and crew are furnished by the line whose track is used, the charge shall be one dollar per train mile, with no charge for fuel, water and engine supplies.

The road for which the train is detoured shall pay the regular Per Diem and mileage to the owners of the cars in the train, including the road owning the track, if any of its cars shall be in the detoured train. All mileage charges shall be at actual distance over the detoured route.

7. The following rates for the use of passenger equipment shall be in force unless otherwise arranged between the roads concerned.

(A) The rate for coaches, dining cars, chair cars, parlor cars, combined passenger cars and postal cars, shall be 3 cents per mile of actual distance; and for baggage, express, mail storage, combined baggage-express, combined baggage-mail, and combined baggage-mail-express cars, 1½ cents per mile of actual distance. These rates are to apply when the owners of the cars participate in the business and not when the cars are hired to other lines.

(B) The per diem rate for coaches, dining cars, chair cars, parlor

cars, combined passenger cars and postal cars, hired at other
91 than mileage rates, shall be five dollars per day, and for bag-
gage, express, mail storage, combined baggage-express, combined baggage-mail, and combined baggage-mail-express cars, three dollars per day, subject, however, to agreement between the parties interested.

8. When a per diem rate is charged for the use of passenger equipment, as provided for in Rule 7, the total number of hours of all cars of the same class shall be calculated on a basis of twenty-four hours for each day and the charge made accordingly; any fraction of a day over the aggregate number of days of twenty-four hours each to be counted as one day; it being understood that the minimum charge shall be one day for each car.

When necessary to haul cars empty over the roads owning them, or intermediate roads for delivery to the borrowing roads, the tariff rate for such cars shall be charged the borrowing roads for hauling the cars from the points where they left service to the points of connection with the borrowing roads and return; the charge for
10 the empty haul to be named to the borrowing roads at the time the agreement to loan cars is made.

Rule 8. See page 12.

9. The car service charge for delay in loading or unloading a freight car shall be one dollar a day after forty-eight hours from the time of delivery of the car for loading or unloading, not including Sundays or legal holidays, except where rates are fixed by Statute or local Car Service Associations.

Proper notice shall be provided in bills of lading, tariffs and expense bills, notifying shippers and consignees of the charge.
92 Charges for the delay of cars shall not be refunded except on the approval of the transportation officer designated by each road; at points where Car Service Association Rules are in force such additional regulations shall prevail as those rules may provide.

10. When any freight car is detained on a road by reason of a railroad error, the Car Service charges which may have accrued against shipper or consignee during the time such car is held awaiting proper data shall be cancelled; and the erring road shall pay to the road holding the car for the time the car is held until sufficient data is received to release it, the rate established by the Per Diem Rules for freight cars.

Where car service associations exist, the facts in the case shall be certified to the road upon which the Per Diem accrues by the manager of the Car Service Association, the claim against the erring road being made direct by the holding road.

11. New freight cars shall be stenciled when built with actual light weight, date of weighing and capacity. Steel cars shall be re-weighed and re-stenciled within the first year thereafter and wooden cars at the end of the first and second years.

All cars which have received general repairs shall be
11 weighed and stenciled, with the actual weight, immediately before being put back into service.

Any car without stenciling shall be immediately weighed and

stenciled. New weights of foreign cars shall be reported to car owners.

12. The maximum excess allowed over the marked capacity of freight cars shall not exceed 10 per cent. of such marked capacity.

93 13. The placing of advertisements or placards of any kind by shippers upon freight cars is prohibited.

12 QUESTIONS.

ON VARIOUS POINTS UNDER THE CAR SERVICE RULES AND DECISIONS OF THE COMMITTEE ON CAR SERVICE WHICH HAVE BEEN APPROVED BY THE ASSOCIATION.

RULE 3.

"Will you kindly advise me whether it is the intention to allow railroad companies to take switch cars and move them out on their lines for loading to owners? Rule 3 of the Code of Car Service Rules, adopted October 24th last, does not discriminate between switch cars and those received in through business."

In answer to this question the Committee's reply is "No."—*October* 23, 1901.

"Referring to the first paragraph of Rule 3 in the Code of Car Service Rules adopted by The American Railway Association October 24, 1900, which reads as follows:

"Foreign cars may be sent empty in the direction opposite to the junctions at which they were received for loads to points on or reached by using the home roads, but not otherwise."

"Will you kindly advise me your construction of this rule? Do the closing words 'but not otherwise' prevent the loading of a car in an opposite direction for the purpose of securing a load to points on or reached by using the home road, while permitting the cars to be sent empty for the same purpose?"

In reply to this question the answer of the Committee is that *it does.—October* 23, 1901.

RULE 8.

"In paying the per diem for cars under the provisions of Rule 8, is it the intention of the Committee that the aggregate number of hours of all cars hired to another line from time to time during a current month, or any other period for which bill is rendered, should be taken and divided by the aggregate number of hours by
94 twenty-four to find the number of days and fractions thereof for a basis of settlement; or is it the intention of the Committee to make charges and settlement on a basis of each individual car?"

Answer.—Rule 8 provides that, "the total number hours of all cars of the same class shall be calculated on a basis of twenty-four hours for each day and the charge made accordingly;" and it is, therefore, not the intention of the Committee to have charges and settlements made on a basis of each individual car.—*October* 23, 1901.

13 CODE OF

PER DIEM RULES

GOVERNING SETTLEMENT FOR THE USE OF FREIGHT CARS.

IN EFFECT JULY 1, 1905.

ADOPTED APRIL 24, 1902;
WITH AMENDMENTS AGREED TO OCTOBER 28, 1903,
APRIL 27, 1904, OCTOBER 26, 1904,
AND APRIL 5, 1905.

14 ## PER DIEM RULES AGREEMENT.

The subscribing railroad company promises and agrees with each railroad company severally which heretofore or hereafter may have subscribed and filed a like agreement with the Secretary of The American Railway Association, that the subscriber will abide by the rules governing settlement for the use of freight cars, as adopted by the Association and designated "Per Diem Rules" on the
95 minutes of its proceedings; this agreement to continue until withdrawn by three months' previous notice in writing to the Secretary of the Association.

15 ## DEFINITIONS.

HOME CAR.—A car on the road to which it belongs.

FOREIGN CAR.—A car on a road to which it does not belong.

PRIVATE CAR.—A car having other than railroad ownership.

HOME.—A location where a Car is in the hands of its owner.

HOME ROAD.—The road which owns a car, or upon which the home of a private car is located.

HOME ROUTE.—The line of intermediate roads over which a foreign car was moved from home.

HOME JUNCTION.—A junction with the home road.

HOME ROUTE JUNCTION.—A junction on the home route.

SWITCHING SERVICE.—The movement of a car to be loaded or unloaded, or the movement of a car between railroads, at a charge for the service rendered within designated switching limits, the road performing the service not participating in the freight rate.

17 ## PER DIEM RULES.

GOVERNING SETTLEMENT FOR THE USE OF FREIGHT CARS.

For Interpretations, see pages 22 to 25.
For Decisions, see pages 26 to 104.

1. The rate for the use of freight cars shall be 20 cents per car per day which shall be paid for every calendar day, and shall be known as the per diem rate.

RULE 1.—See Interpretation No. 25.

96 2. Days shall be reckoned by subtracting the date of receipt from the date of delivery. The day of receipt should be disregarded, and payment made for day of delivery.

A road receiving and delivering a car on the same date shall not pay the Per Diem for that day.

RULE 2.—See Interpretation No. 9.

3. A road shall have the right to demand the return of its car after it has been twenty days consecutively on any road. If the car is held by the road more than ten days after the date of such notice on the prescribed form (L), making thirty days in all, thereafter a penalty rate of 80 cents per day in addition to the per diem rate shall be paid by such road for the further use of that car.

RULE 3.—See Interpretations Nos. 10, 12, 13, 14, 15, 16, 20, 25 and 26, and Decisions Nos. 15 and 22.

4. All railroads, including ferry lines, shall be responsible to the car owner for amounts accruing for the use of a car at the established rates, whether such car is in road service or switching service, until the car has been delivered to the owner or to another road.

RULE 4.—See interpretations Nos. 5 and 25, and Decisions Nos. 1, 16 and 17.

5. An arbitrary amount for each car in switching service may be reclaimed by the switching line from the road for which the service was performed. This amount shall be based upon the aver-
18 age number of days actually required and determined by the roads directly interested for each local territory.

RULE 5. See Interpretations Nos. 7, 11, 18 and 19, and Decisions Nos. 6, 8, 9, 10, 12, 13, 14, 18, 19, 20, 21 and 23.

6. In case a road delivers an empty foreign car without the consent of the owner to a road which does not pay Per Diem; or if a road permits the loading or re-consigning of a foreign car without
97 the consent of the owner to such road it shall be responsible to the owner for the payment of an amount equal to the Per Diem accruing on the car while on such road.

In case the road so delivering or authorizing the delivery of a foreign car connects directly with the road which does not pay per Diem, penalty shall accrue as if delivery had not been made.

RULE 6.—See Interpretation No. 6 and Decision No. 13.

7. When home route cards have been requested under the Master Car Builders' Rules, the Per Diem shall cease from the date of request to owner.

When a car has been destroyed and reported under the Master Car Builders' Rules the Per Diem shall cease from the date of notice to owner.

RULE 7.—See Interpretations Nos. 4 and 8 and Decision No. 5.

8. When a car is detained awaiting the receipt of repair material from its owner, the Per Diem shall cease from the date the necessary material is ordered from the owner until the date when it is received by the road holding the car.

RULE 8.—See Interpretations Nos. 12, 13, 17 and 21.

9. The Interchange Reports shall close at midnight, and shall include all cars exchanged upon the date named unless otherwise

noted thereon. The reports must be sent to the car record office on each day whether cars are exchanged or not.

In cases where there are different standards of time at junction points the time of the more easterly reckoning shall be used.

19 The Interchange Reports to the car record office from Junction points must be signed by the agents or other authorized representatives of both roads on the prescribed form, the receipt of cars delivered being thereby acknowledged. Car Service Rule

98 5 governs the delivery of cars.* The time of delivery of cars upon interchange tracks of connecting lines shall, *prima facie*, be the time given by the delivering roads.

RULE 9.—See decisions 2, 4 and 7.

10. The Junction Report for each day will be made to car owners on the prescribed form (D) as promptly as possible after the receipt of the Interchange Report for that day.

11. Within thirty days after the end of each calendar month, car owners shall be furnished with a Per Diem Report for that month, on the prescribed form, showing the number of days each car has been in service upon the road making the report.

Statements of corrections or omissions in Per Diem Reports must be presented within one year from the date when the Per Diem report to which they relate has been received. This will not prevent the continuance of any case after the period named, if it has been previously opened, even though the claim should eventually rest upon some road other than the one originally addressed.†

RULE 11. See Interpretations Nos. 1, 2, 3 and 9.

20 12. The settlement of amounts accruing for the use of cars and reclaims under Rule 5 shall be made monthly without regard to reclaims pending under Rules 13, 14 and 15.

12. The settlement of amounts accruing for the use of cars and reclaims under Rule 5 shall be made monthly without re-

99 *gard to reclaims pending under Rules 13, 14 and 15.*

13. When reclaims are made for allowances, under Rules 14 and 15, or on account of special conditions, they must be made by the designated transportation officer of the road which pays the Per Diem to the designated transportation officer of the road from which the allowance is reclaimed.

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*Car Service Rule 5.

5. Cars shall be considered as having been delivered to a connecting railroad when placed upon the track agreed upon and designated as the interchange track for such deliveries, accompanied or preceded by proper data for forwarding and accepted by the car inspector of the receiving road.

Unless otherwise arranged between the roads concerned the receiving road shall be responsible for the cars, contents and Per Diem after receipt of the proper data for forwarding and until they have been accepted by its inspector or returned to the delivering road.

†This paragraph will not apply to statements bearing on amounts accruing prior to July 1, 1905.

14. A road failing to receive promptly from a connection cars upon which it has laid no embargo shall be responsible to the connection for the Per Diem on cars held for delivery, including the home cars of such connection.

If such failure to receive shall continue for more than three days, the delinquent line shall thereafter in addition be responsible for the Per Diem on all cars wherever in transit which are thus held back for delivery.

It shall be the duty of a connection intending to reclaim such Per Diem allowance to notify the delinquent line daily of the total number of cars so held for it, and when required, to furnish the initials and numbers of the cars.

RULE 14.—See Interpretations Nos. 20, 23 and 24, and decisions Nos. 3, 11 and 26.

15. When a road gives notice to a connection that for any reason it cannot accept cars in any specified traffic, thereby instituting an embargo, it should receive cars already loaded with such traffic at the time such notice is issued. If it does not receive such cars the road holding them may reclaim Per Diem from the road placing the embargo for the number of days such cars are held not exceeding the duration of the embargo.

100 After the date of the notice a road must not load or reconsign cars in such traffic to the road issuing the notice.

All such notices must be given by telegraph, by the embargoing road, to its immediate connection and by it transmitted as

21 may be necessary.

RULE 15.—See Interpretations Nos. 20, 22 and 23.

16. These rules shall not apply to private cars.

17. To interpret these rules and to settle disputes arising under them an Arbitration Committee of five members shall be appointed by the Committee on Car Service. Three members of the Arbitration Committee shall be a quorum.

In case any question or dispute arises under these rules it may be submitted to the Arbitration Committee through the Secretary of the Association on abstract. The abstracts shall briefly set forth the points at issue and each party's interpretation of the rules upon which its claim is based. The Arbitration Committee shall base its decisions upon the rules and the abstracts submitted, and its decisions shall be final. Should one of the parties refuse to furnish the necessary information the Arbitration Committee shall use its judgment as to whether it can properly decide. All decisions shall be reported to the Association through the Committee on Car Service.

In case a question shall arise not covered by the rules the roads disagreeing may, by mutual consent, submit such questions to the Arbitration Committee.

The Committee on Car Service may appoint a secretary for the Arbitration Committee, who shall be paid by the Association. The other expenses of the Arbitration Committee shall be divided equally between each of the parties to the dispute and the Association.

101 The minimum charge to each road shall be $10, payable in advance. The expenses shall be first paid by the Associati[illegible]a

and then billed to the parties concerned by the Treasurer of the Association.

22 *Interpretations of the Code of Per Diem Rules Rendered by Arbitration Committee.*

Question No. 1. A foreign car received and delivered the same day, should it appear on the Per Diem Report or not?

Answer. The car should be reported by car number as having earned no Per Diem.

Question No. 2. A foreign car received July 31st and delivered to a connection August 5th, should it appear on July Per Diem Report?

Answer. Car number need not appear on July report.

Question No. 3. A foreign car received July 26th and delivered to a connection August 5th, should it show five days in July account and five days in August account?

Answer. Yes.

Question No. 4. (*Note.*—Refers to rule in effect prior to January 1, 1904.)—If a road has a foreign car in a general worn-out condition, and under the Master Car Builders' Rules asks the car owner for proper cards to move the car home, are they responsible for the Per Diem during the time they are holding car for these cards, or would it be proper to construe Rule 7 as meaning that Per Diem will cease from the date that correspondence commences with the owner as to whether car will be repaired or returned to owner?

Answer. The words "When a car has been destroyed, or so damaged as to require an appraisement," in Rule 7 refer to cars
102 actually destroyed or condemned to be destroyed, and Per Diem should be paid on all other bad order cars.

Question No. 5. Should new cars en route from builder to owner, empty or loaded, be exempt from Per Diem?

Answer. Yes.

Question No. 6. Is a road responsible to the owner of a foreign car which they deliver to a road which does not pay Per Diem, while on that road, unless it receives from the owner of the car a
23 notice to the effect that their cars are not permitted to go on roads which do not pay Per Diem?

Answer. The road would be responsible for the Per Diem, and it is not necessary for the car owner to issue notice to that effect.

Question No. 7. Is a switching line entitled to reclaim the allowance on its own cars when tendered to it to be switched on account of another line?

Answer. A road cannot reclaim the allowance for the use of its own cars.

Question No. 8. Should Per Diem be allowed on freight cars in July that were totally destroyed in June but not reported to car owners until after July 1st?

Answer. Yes.

Question No. 9. Should Per Diem be paid on cars for July 1, 1902, that were on hand 12.01 A. M., July 1, 1902?

Answer. Yes.

Question No. 10. In case a car is received on the first day of the month, can penalty notice for return of car be dated on the 21st of that month, or must it be dated later?

Answer. Notice may be dated on the 21st.

Question No. 11. Does Rule 5 apply to cars that were in
103 switching service at 12.01 A. M., July 1, 1902?

Answer. Yes, unless otherwise specially agreed. The amount of reclaim is in the hands of the roads interested in each local territory.

Question No. 12. If a road receives a car on the first day of the month; damages it and orders material from owner on the 25th; material is received on the 20th of the following month; penalty notice is served by car owner on the thirtieth day after its receipt, or five days after material is ordered: When should road holding car commence paying the penalty rate?

Answer. Penalty notice takes effect in this case on receipt of material and penalty rate begins ten days thereafter.

Question No. 13. If a road receives a car on the first day
24 of the month; damages it and orders material from owner on the 11th; material is received on the 30th; on the twenty-fifth day after car is received penalty notice is served by car owner: Is this demand for penalty legal or are the rules for the collection of penalty suspended the same as they are for the Per Diem?

Answer Demand for penalty is legal, but does not take effect in this case until ten days after material is received and penalty rate begins twenty days after material is received, as delay to car while awaiting material should not be computed.

Question No. 14. (*Note.*—Refers to rule in effect prior to January 1, 1905.)—If a road sends a penalty notice demanding a return of one of its cars, and before the ten days expire, the road having possession of the car delivers it to a road which does not pay Per
104 Diem, does this delivery release it from the penalty for which the notice has been given?

Answer. Yes.

Question No. 15. (*Note.*—Refers to rule in effect prior to January 1, 1905.)—In case a road has a foreign car for which it is liable for the $1.00 per day, would the delivery to a road which does not pay Per Diem stop the penalty of eighty cents a day?

Answer. Yes.

Question No. 16. Should the penalty rate accruing on a car on a road which does not pay Per Diem be paid by the road responsible for the Per Diem on that car?

Answer. Yes.

Question No. 17. Referring to Rule 8, should Per Diem be paid for date material is ordered, or for date on which material is received?

Answer. For date received.

Question No. 18. If a road handles a car between the junction of another road and a point on its line in a switching district under a

special switching arrangement with the shipper or consignee;
25 under such circumstances is the switching road entitled to a reclaim on the long haul road for the agreed allowance at that point?

Answer. No.

Question No. 19. Does Rule 5 apply when switching charge is assessed on a ton instead of a car basis?

Answer. Yes.

Question No. 20. Under Rules 14 and 15, is the railroad which fails to accept cars responsible for penalty rate as well as the Per Diem Rate?

Answer. Yes.

105 Question No. 21. Referring to Rule 8; when repair material is ordered, should the car numbers be sent to owner of the car if Per Diem is to be waived?

Answer. Yes.

Question No. 22. Under Rule 15 can a road reclaim Per Diem on its own cars?

Answer. Yes.

Question No. 23. In case a car held under Rules 14 or 15 for a certain road, is not delivered to that road, can reclaim be made against such road?

Answer. No.

Question No. 24. Under Rule 14, can the expression "and, when required, to furnish the initials and numbers of the cars," be interpreted to mean that a daily list shall be made which shall include initials and numbers of cars previously reported?

Answer. No.

Question No. 25. Under Rules 1, 3 and 4 must the Per Diem and penalty rate be paid by a road for the "use" of a car, when it is out of repair, unfit for service, or lying idle?

Answer. Yes.

Question No. 26. Under rule 3 and Interpretation No. 20 can penalty be collected by the owner road on its own cars when held for connecting line under Rule 14?

Answer. No.

106 Mr..... .....

.....R.....

....

Form No. (D)

North & South Railroad.

Junction Report of Cars Delivered to Our Connections.

On.....190...

(Printed Signature)
.....

(Title of Officer)
.....

(Address)
.....

x Loaded. — Empty.

Car.		x —	Delivered to (Full Initials)
Full initials.	Number.		

☞ NOTE.—Standard size, $3\frac{1}{4}$ x $5\frac{1}{2}$ inches, including margins.

107

Form No. (L).

NORTH & SOUTH RAILROAD.

Penalty Notice.

(Address and Date.)

..... 190....

Mr. .....

.....

.....

Cars of this Company as enumerated below have been on your line 20 consecutive days and you are hereby notified that unless same are disposed of within 10 days from this date, a penalty of 80 cents per car per day, in addition to the regular per diem rate, will be charged for these cars.

(Printed Signature.)

.....

(Title of Officer.)

.....

Retain original; return copy.

Check.	Car.			Delivered.		Reply.		
	Initials.	Kind.	Number.	By or at.	Date.	Location.	Disposition.	Date.
1								
2								
3								
4								
5								
6								
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☞ NOTE.—Standard sizes 8 x 10½ and 8 x 5¼ inches, including margins. Penalty notices should be printed in bright red ink on any color or quality of paper that each road may prefer.

Penalty notices must be mailed in duplicate, the original to be retained by the receiving road; the copy to be returned as an acknowledgment, and bearing notations showing dispositions made of the cars which may have cleared the lines of the receiving road.

No other styles of penalty notices will be used, either of different sizes, different styles or by postal card.

All Penalty notices should be mailed in an envelope bearing the full and complete address, (name, title road, town and state) of the officer to whom sent.

Preferably, Penalty notices should be sent by U. S. Mail only, although in the case of immediate and direct connections, they may be forwarded by Railway service.

EXHIBIT "A" FOR IDENTIFICATION.

New York Central Capital Stock Tax 1902.

Total Assets..... $359,316,025.89
Average Capital Stock at Par..... 123,458,150 00
Average Cash Value 200,156,525.69

Assets Employed.		Capital Stock at Par.		Capital Stock Cash Value.		Tax.
In N. Y. State.	Outside of N. Y. State.	In N. Y. State.	Outside of N. Y. State.	In N. Y. State.	Outside of N. Y. State.	
		Revised Statement.				
227,856,175.92	131,459,849.97	78,289,583.32	45,168,566.68	126,926,986.95	73,229,538.74	190,390.48
		Add 89 % of M D T Stock:				
2,311,686.00		794,227.06		1,287,721.68		1,931.58
		As per Report:				
230,167,861.92	129,148,163.97	79,083,860.38	44,374,289.62	128,214,708.63	71,941,817.06	192,322.06
		Add outside equipment:				
On System 4,780,862.98		1,642,666.78		2,663,175.52		3,994.76
On Foreign Rds. 11,865,528.08		4,076,901.79		6,609,677.01		9,914.52
		Report and Equipment:				
246,814,252.98	112,501,772.91	84,803,428.95	38,654,721.05	137,487,559.16	62,668,966.53	206,231.34
		Add unexplained addition:				
3,593,804.09		1,234,802.74		2,001,923.90		3,002.89
		Basis of Taxation:				
250,408,057.07	108,907,968.82	86,038,231.69	37,419,918.31	139,489,483.06	60,667,042.63	209,234.23

109 EXHIBIT "B."

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6/5, 1905.

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DEAR SIR: Below please find movements of N. Y. C. .....
Car number 90110, from Lockport to Oklahoma City.

C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from					M		
From Lockport	9	30	'02		M		
To M. C.	10	1	"		M		
To C. Belt	10	3	"		M		
To C. & Alton	10	5	"		M		
To W. Ferry Co.	10	3	"		M		
To Mo. Pac.	10	8	"		M		
To A. T. & S. F.	10	10	"		M		
To 'Frisco System	10	17	"		M		
To Terminal R.R.	11	3	"		M		
To So. Pac.	11	5	"		M		
To Terminal R.R.	..	..	"		M		
To Big Four	11	11	"		M		
To L. S. & M. S.	11	13	"		M		
To N. Y. C.	11	19	"		M		
Del'd to					M		

110 EXHIBIT "B-1."

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6/5, 1905.

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DEAR SIR: Below please find movements of N. Y. C. .....
Car number 31772 from Schenectady to Clearwater, S. C.

C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from					M		
From Schenectady	3	6	'02		M		
To Canandaigua	3	8	"		M		
To P. R.R.	3	8	"		M		
To Wash. South	3	10	"		M		
To R. F. & P.	3	11	"		M		
To South. Ry.	3	11	"		M		
To N. & W.	4	10	"		M		
To P. & R.	4	13	"		M		
To Erie	5	21	"		M		
To N. Y. C	7	2	"		M		

EXHIBIT "B-1."

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6/5, 1905.

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DEAR SIR: Below please find movements of N. Y. C. . . . . Car number 56491, from Weehawken to Berlin, Ont.

C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from					M		
From W'k'n	3	17	'02		M		
To Susp. Bridge	3	20	"		M		
To G. T.	3	20	"		M		
To M. C.	4	3	"		M		
To L. S. & M. S.	4	6	"		M		
To N. Y. C.	4	16	"		M		

111

EXHIBIT "C."

EXHIBIT "4" AND EXHIBIT "C" FOR IDENTIFICATION.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK *Jan. 16th*, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 41278 from

C. H. EWINGS, Car Acc't.

FROM	TRAIN. DATE.	TIME.	TO	L. OR E. DATE.	TIME.	CON.
N. Y. Central	4/19		Mich. Central	4/19		
Mich. Central	5/10		L. S. & M. S.	5/10		
L. S. & M. S.	6/6		Vandalia	6/6		
Vandalia	6/13		L. S. & M. S.	6/13		
L. S. & M. S.	6/24		Pere Marquette	6/24		
Pere Marquette	7/16		Mich. Central	7/16		
Mich. Central	7/18		Pere Marquette	7/18		
Pere Marquette	7/20		Mich. Central	7/20		
Mich. Central	9/21		Penn. Company	9/21		
Penn. Company	10/17		L. S. & M. S.	10/17		
L. S. & M. S.	10/31		Pitts. & Lake Erie.	10/31		
P. & Lake Erie.	12/8		Penn. R.R.	12/8		
Penn. R.R.	12/9		Penn. Company	12/9		
Penn. Company	12/12		Erie	12/12		
Erie	12/17		Clev., Cinn., Chic. & St. L.	12/17		

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *January* 16*th*, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 41038 from C. H. EWINGS, Car Acc't.

FROM	TRAIN.	DATE.	TIME.	TO	L. OR E. DATE.	TIME.	CON.
N. Y Central		4/28		L. S. & M. S.		4/28	
L. S. & M. S.		5/8		Lake Erie & West		5/8	
L. E. & Western		5/20		L. S. & M. S.		5/20	
L. S. & M. S.		6/2		Grand Trunk		6/2	
Grand Trunk		6/19		Mich. Central		6/19	
Mich. Central		7/26		Chic., Milw. & St. P.		7/26	
Chic., Milw. & St. P.		7/29		Mich. Central		7/29	
Mich. Central		8/26		Chic. Junction		8/26	
Chic. Junction		8/31		Mich. Central		8/31	
Mich. Central		10/10		Chic., Rock I. & Pac.		10/10	
C., R. I. & Pac.		10/14		Missouri Pac.		10/14	
Mo. Pac.		10/20		C., R. I. & Pac.		10/20	
C. R. I. & Pac.		11/27		Chicago, Peoria & West.		11/27	
Chicago, Peoria & West.		11/29		Chic. R. I. & Pac.		11/29	
C. R. I. & Pac.		12/1		Ind. Ill. & Iowa		12/1	
I. I. & Iowa		12/2		N. Y. Chic. & St. L.		12/2	
N. Y. C. & St. L.		12/5		Lehigh Valley		12/5	
Cent. of N. J.		1/2		Penn. Railroad		1/2	
Lehigh Valley		12/7		Cent. of New Jersey		12/7	
Penn. R.R.		1/9		Washington South		1/9	

112 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *Jan.* 16*th*, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 59578 from C. H. EWINGS, Car Acc't.

FROM	TRAIN.	DATE.	TIME.	TO	L. OR E. DATE.	TIME.	CON.
N. Y. Central		4/2		L. S. & M. S.		4/2	
L. S. & M. S.		4/17		Lake Erie & West		4/17	
L. E. & Western		5/8		Cin. Ham. & Dayton		5/8	
Cin. Ham. & Dayton		5/20		L. S. & M. S.		5/20	
L. S. & M. S.		5/23		Mich. Central		5/23	
Mich. Central		6/4		Erie		6/4	
Erie		6/15		Mich. Central		6/15	
Mich. Central		8/20		Tor. Ham. & Buffalo		8/20	
Tor. Ham. & Buffalo		8/21		Mich. Central		8/21	
Mich. Central		9/15		Chic. & Alton		9/15	
Chic. & Alton		9/30		L. S. & M. S.		9/30	
L. S. & M. S.		10/12		Atch. Top. & S. Fe.		10/12	
Atch. Top. & S. Fe.		10/15		Ill. Northern		10/15	
Ill. Northern		10/19		Atch. Top. & S. Fe.		10/19	
Atch. Top. & S. Fe.		10/23		L. S. & M. S.		10/23	
L. S. & M. S.		10/31		Del. Lack. & Western		10/31	
Del. Lack. & Weste'n		11/28		Mich. Central		11/28	
Mich. Central		12/26		L. S. & M. S.		12/26	
L. S. & M. S.		1/1		Penn. R.R.		1/1	

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *Jan. 16th*, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 63158 from C. H. EWINGS, Car Acc't.

FROM	TRAIN.	DATE.	TIME.	TO	L. OR E. DATE.	TIME.	CON.
N. Y. Central		6/12		L. S. & M. S.		6/12	
L. S. & M. S.		7/11		Ohio Cent. Lines		7/11	
Ohio Cent. Lines		7/18		L. S. & M. S.		7/18	
L. S. & M. S.		8/18		Pere Marquette		8/18	
Pere Marquette		9/8		L. S. & M. S.		9/8	
L. S. & M. S.		9/18		Wabash		9/18	
Wabash		9/28		L. S. & M. S.		9/28	
L. S. & M. S.		10/2		Chic. Mil. & St. P.		10/2	
Chic. Mil. & St. P.		10/5		Union Pacific		10/5	
Union Pacific		10/11		Southern Pacific		10/11	

113 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *Jan. 16th*, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 18236 from C. H. EWINGS, Car Acc't.

FROM	TRAIN.	DATE.	TIME.	TO	L. OR E. DATE.	TIME.	CON.
N. Y. Central		3/5		Mich. Central		3/5	
Mich. Central		3/6		Pere Marquette		3/6	
Pere Marquette		4/2		Mich. Central		4/2	
Mich. Central		4/10		Chic. Ind. & L'ville		4/10	
Chic. Ind. & Lou.		5/3		Elgin Jol. & Eastern		5/8	
Elgin, Jol. & Eastern		5/8		L. S. & M. S.		5/8	
L. S. & M. S.		5/13		Wheeling & L. Erie		5/13	
Wheeling & L. Erie		6/6		L. S. & M. S.		6/6	
L. S. & M. S.		6/9		Ill. Central		6/9	
Ill. Central		7/2		L. S. & M. S.		7/2	
L. S. & M. S.		8/21		Cin. Ham. & Dayton		8/21	
Cin. Ham. & Dayton		8/24		Louisvl. & N'shville		8/24	
Louisvl. & N'shville		9/24		Penn. Company		9/24	
Penn. Company		11/10		Lake Erie & Western		11/10	
Lake Erie & Western		11/25		Penn. Company		11/25	
Penn. Company		12/20		Clev. Cin. Chic. & St. L.		12/20	

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *Jan. 16th*, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 63123 from

C. H. EWINGS, Car Acc't.

FROM	TRAIN. DATE. TIME.	TO	L. OR E. DATE. TIME. CON.
N. Y. Central	6/15	L. S. & M. S.	6/15
L. S. & M. S.	6/18	Penn. Railroad	6/18
Penn. Railroad	6/22	L. S. & M. S.	6/22
L. S. & M. S.	6/25	Baltimore & Ohio	6/25
Baltimore & Ohio	7/17	L. S. & M. S.	7/17
L. S. & M. S.	8/1	Penn. Company	8/1
Penn. Company	8/6	L. S. & M. S.	8/6
L. S. & M. S.	8/14	Wheeling & L. E.	8/14
Wheeling & Lake E.	9/5	Mich. Central	9/5
Mich. Central	9/10	Wis. Central	9/10
Wis. Central	9/21	Mich. Central	9/21
Mich. Central	9/26	Chic. Ter. & Trans.	9/26
Chic. Ter. & Trans.	10/7	Chicago Belt	10/7
Chic. Belt	10/8	N. Y. Chic. & St. L.	10/8
N. Y. Chic. & St. L.	10/10	L. S. & M. S.	10/10
L. S. & M. S.	11/5	Chic. Bur. & Quin.	11/5
Chic. Bur. & Quin.	11/20	Chic. Belt	11/20
Chic. Belt	11/20	Mich. Central	11/20
Mich. Central	12/8	Detroit, Tol. & Mil.	12/8
Detroit, Tol. & Mil.	12/21	Penn. Company	12/21

114 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *Jan. 16th*, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 63176 from

C. H. EWINGS, Car Acc't.

FROM	TRAIN. DATE. TIME.	TO	L. OR E. DATE. TIME. CON.
N. Y. Central	2/11	L. S. & M. S.	2/11
L. S. & M. S.	2/14	C. C. C. & St. L.	2/14
C. C. C. & St. L.	2/17	Ohio Central Lines	2/17
Ohio Central Lines	2/22	Chesapeake & Ohio	2/22
Chesap. & Ohio	3/27	C. C. C. & St. L.	3/27
C. C. C. & St. L.	3/29	Ill. Central	3/29
Ill. Central	4/11	Chic. Ter. & Trans.	4/11
Chic. Ter. & Trans.	4/12	Chic. Belt	4/12
Chic. Belt	4/30	L. S. & M. S.	4/30
L. S. & M. S.	5/16	Chic. Junction	5/16
Chic. Junction	5/20	L. S. & M. S.	5/20
L. S. & M. S.	5/24	Lehigh Valley	5/24
Lehigh Valley	5/28	N. Y., N. H. & H.	5/28
N. Y., N. H. & H.	5/29	Boston & Maine	5/29
Boston & Maine	6/21	N. Y., N. H. & H.	6/21
N. Y., N. H. & H.	7/6	Lehigh Valley	7/6
Lehigh Valley	7/7	Ironton R.R.	7/7
Ironton R.R.	7/8	Lehigh Valley	7/8
Lehigh Valley	7/11	Mich. Central	7/11
Mich. Central	9/12	Lehigh Valley	9/12
Lehigh Valley	9/21	Norfolk & Western	9/21
Norfolk & Western	10/31	C. C. C. & St. L.	10/31
C. C. C. & St. L.	11/2	Grand Rap. & Ind.	11/2
Grand Rap. & Ind.	11/15	Dul. S. Shore & Atl.	11/15
Dul., S. Shore & Atl.	11/17	M. St. P. & S. Ste. M.	11/17
M. St. P. & S. Ste. M.	11/29	Dul. S. Shore & Atl.	11/29
Dul. S. Shore & Atl.	12/3	Grand Rap. & Ind.	12/3
Grand Rap. & Ind.	12/18	Penn. Company	12/18

115 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *Jan. 16th*, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 64431 from C. H. EWINGS, Car Acc't.

FROM	TRAIN.	DATE.	TIME.	TO	L. OR E. DATE.	TIME.	CON.
N. Y. Central		6/27		L. S. & M. S.			6/27
L. S. & M. S.		7/8		Chic. Ind. & St. L.			7/8
Chic. Ind. & St. L.		7/14		Mich. Central			7/14
Mich. Central		7/30		Det. Tol. & Mil.			7/30
Det. Tol. & Mil.		8/5		L. S. & M. S.			8/5
L. S. & M. S.		8/18		Penn. R.R.			8/18
Penn. R.R.		9/7		N. Y., N. H. & H.			9/7
N. Y., N. H. & H.		9/9		Boston & Maine			9/9
Bost. & Maine		9/17		N. Y., N. H. & H.			9/17
N. Y., N. H. & H.		9/19		Bost. & Maine			9/19
Bost. & Maine		9/24		N. Y., N. H. & H.			9/24
N. Y., N. H. & H.		10/4		Penn. R.R.			10/4
Penn. R.R.		10/22		Penn. Co.			10/22

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *February* 9, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 61834 from C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from							
From N. Y. C.							
To L. S. & M. S.	July	2	1902		M		
From L. S. & M. S.							
To Elgin, Joliet & Eastern	"	6	"		M		
From Elgin, Joliet & Eastern							
To Chicago & No. Western	"	8	"		M		
From Chicago & No. Western							
To Union Pacific	"	10	"		M		
From Union Pacific							
To Southern Pacific	"	14	"		M		
From Southern Pacific							
To Union Pacific	Aug.	8	"		M		
From Union Pacific							
To Southern Pacific	"	11	"		M		
Delivered to Southern Pacific							
Rec'd from Southern Pacific							
From Southern Pacific							
To Atch., Topeka & Santa Fe Coast Line	Dec.	17	"		M		
From Atch., Topeka & Santa Fe Coast Line							
To Southern Pacific	"	18	"		M		

116 New York Central & Hudson River Railroad Co.

New York, *February* 9, 1903.

Dear Sir: Below please find movements of N. Y. C. Car number 14035 from C. H. Ewings, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from					M		
N. Y. C.					M		
To L. S. & M. S.....	Dec.	20	1901		M		
From L. S. — M. S.....					M		
To Cleve., Cin., Chic. & St. L...	"	23	"		M		
From Cleve., Cin., Chic. & St. L.					M		
To Norfolk & Western.....	"	28	"		M		
From Norfolk & Western.....					M		
To Cleve., Cin., Chic. & St. L...	Jan.	8	1902		M		
From Cleve., Cin., Chic. & St. L.					M		
To Norfolk & Western.....	"	12	"		M		
From Norfolk & Western.....					M		
To Chesapeake & Ohio.....	"	14	"		M		
From Chesapeake & Ohio.....					M		
To Southern	"	20	"		M		
Del'd to					M		
Rec'd from					M		
From Southern					M		
To Washington Southern.....	Feb.	20	"		M		
From Washington Southern...					M		
To Southern	Mar.	15	"		M		
From Southern					M		
To Baltimore & Ohio.....	"	24	"		M		
From Baltimore & Ohio.....					M		
To Southern	Apr.	21	"		M		
From Southern					M		
To Baltimore & Ohio.....	July	9	"		M		
From Baltimore & Ohio.....					M		
To Southern	"	11	"		M		
From Southern					M		
To Washington Southern.....	Sept.	3	"		M		
Del'd to							
Rec'd from					M		
From Wash. Southern.....					M		
To Southern	Oct.	26	"		M		
From Southern					M		
To Chesapeake & Ohio.....	Nov.	7	"		M		
From Chesapeake & Ohio.....					M		
To Penn. R.R.	Dec.	3	"		M		
From Penn. R.R.					M		
To Chesapeake & Ohio.....	Jan.	4	1903		M		
From Chesapeake & Ohio.....					M		
To					M		
From					M		
To					M		
From					M		
To					M		
Del'd to					M		

117 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *February* 9, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 27941 from C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from					M		
N. Y. C.					M		
To Mich. Central	June	12	1902		M		
From Mich. Central					M		
To Chic., R. I. & Pac.	"	14	"		M		
From Chic., R. I. & Pac.					M		
To Colo. Midland	"	18	"		M		
From Colo. Midland					M		
To Rio Grande Western	"	20	"		M		
From Rio Grande Western					M		
To Southern Pacific	"	21	"		M		
From Southern Pacific					M		
To Union Pacific	Aug.	8	"		M		
From Union Pacific					M		
To Southern Pacific	Sept.	16	"		M		
Del'd to							
Rec'd from					M		
From Southern Pacific					M		
To Union Pacific	"	22	"		M		
From Union Pacific					M		
To Rio Grande Western	"	23	"		M		
From Rio Grande Western					M		
To Colo. Midland	Oct.	7	"		M		
From Colo. Midland					M		
To Denver & Rio Grande	"	31	"		M		
From Denver & Rio Grande					M		
To Colo. Midland	Nov.	5	"		M		
From Colo. Midland					M		
To Chic., R. I. & Pac.	"	25	"		M		
From Chic., R. I. & Pac.					M		
To					M		
Del'd to							

118 EXHIBIT "C" FOR IDENTIFICATION.

PUBLIC STATUTES OF MASSACHUSETTS, 1882.

(p. 23.) See note, 125 U. S., 531.

EXTRACT FROM THE CONSTITUTION OF MASSACHUSETTS.

Part 2, Chap. 1, Sect. 1, Art. 4, of the Constitution gives the Legislature power "to impose and levy proportional and reasonable assessments, rates and taxes upon all the inhabitants of, and persons resident, and estates lying within the said Commonwealth," and also "to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise and commodities whatsoever, brought into, produced, manufactured, or being within the same."

(p. 128.) CHAPTER 13.

OF THE TAXATION OF CORPORATIONS.

* * * * * * *

(p. 138.) TAXATION OF CORPORATE FRANCHISES.

SECT. 38. Every corporation chartered by the commonwealth, or organized under the general laws for purposes of business or profit, having a capital stock divided into shares, excepting banks whose shares are otherwise taxable under this chapter, and except those specified in sections forty-three and forty-six, shall annually, between the first and the tenth days of May, return to the tax commissioner, under the oath of its treasurer, a complete list of its shareholders, with their places of residence, the number of shares belonging to each on the first day of May, the amount of the capital stock of the corporation, its place of business, the par value and market value of the shares on the said first day of May. Such return shall, in the case of stock held as collateral security, state not only the
119 name of the person holding the same, but also the name of the pledger and his residence. The returns shall also contain a statement in detail of the works, structures, real estate and machinery owned by said corporation and subject to local taxation within the commonwealth, and of the location and value thereof. Railroad and telegraph companies shall return the whole length of their lines, and the length of so much of their lines as is without the commonwealth; other corporations required to make a return under this section shall also return the amount, value and location of all works, structures, real estate and machinery owned by them and subject to local taxation without the commonwealth; *provided,* that nothing herein contained shall exempt any corporation from making all returns required by its charter.

(p. 139.) SEC. 39. The tax commissioner shall ascertain, from the returns or otherwise, the true market value of the shares of each corporation included in the provisions of the preceding section, and shall estimate therefrom the fair cash valuation of all of said shares constituting its capital stock on the first day of May next preceding, which shall be taken as the true value of its corporate franchise for the purposes of this chapter. He shall also ascertain and determine the value and amount of all real estate and machinery owned by each corporation, and subject to local taxation, and of the deductions provided in the following section, and for this purpose he may take the amount or value at which such real estate and machinery are assessed at the place where the same are located as the true amount or value; but such local assessment shall not be conclusive of the true amount or value thereof.

120 (p. 139.) SECT. 40. Every corporation embraced in the provisions of section thirty-eight shall annually pay a

tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock, as determined in the preceding section, after making the deductions provided for in this section, at a rate determined by an apportionment of the whole amount of money to be raised by taxation upon property in the commonwealth during the same current year, as returned by the assessors of the several cities and towns under section eighty-six of chapter eleven, upon the aggregate valuation of all the cities and towns for the preceding year, as returned under sections fifty-four and fifty-five of said chapter; *provided*, that in case the return from any city or town is not received prior to the twentieth day of August, the amount raised by taxation in said city or town the preceding year, as certified to the secretary of the commonwealth, may be adopted for the purpose of this determination; and *provided, further*, that the amount of tax assessed upon polls the preceding year, as certified to the secretary, may be taken as the amount of poll tax to be deducted from the whole amount to be raised by taxation, for the purpose of ascertaining the amount to be raised by taxation upon property. From the valuation, ascertained and determined as aforesaid, there shall be deducted– *First*, in case of railroad and telegraph companies, whose lines extend beyond the limits of the commonwealth, such portion of the whole valuation of their capital stock, ascertained as aforesaid, as is proportional to the length of that part of their line lying without the commonwealth; and also an amount equal to the value, as determined by the tax commissioner, of their real
121 estate and machinery located and subject to local taxation within the commonwealth; *Second*, in case of other corporations, included in section thirty-eight of this chapter an amount equal to the value, as determined by the tax commissioner, of their real estate and machinery, subject to local taxation, wherever situated; *provided*, that, whenever the charter of a corporation provides a different method of ascertaining the valuation of its corporate franchise for the purposes of this chapter, the same shall be ascertained in the method provided in such charter.

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(p. 140.) SECT. 42. Every corporation or association chartered or organized elsewhere, which owns, or controls and uses, under lease or otherwise, a line of telegraph within this commonwealth, shall make all the returns prescribed in section thirty-eight to be made by telegraph companies within the commonwealth, excepting the list of its shareholders; and shall annually pay a tax at the same rate, and to be ascertained and determined in the same manner as is provided in section forty; and all telegraph lines within the commonwealth controlled and used by such corporation or association, shall, for the purposes of this chapter, be taken and considered as part of its own lines.

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(p. 142.) SECT. 53. The tax commissioner shall, as soon as may be after the first Monday in August, in each year, notify the treasurer of each corporation, company, copartnership, or association

liable thereto, of the amount of its tax under sections twenty-five, forty, forty-two, forty-five, forty-seven, fifty, and fifty-two, to become due and payable to the treasurer of the commonwealth within thirty days from the date of such notice: *provided*, that it shall not
122 be due and payable earlier than the first day of November. Such notice shall also state that within ten days after the date thereof the said corporation, company, copartnership, or association may apply for a correction of said tax, and be heard thereon before the board of appeal hereinafter established.

(p. 142.) SECT. 54. Any corporation, company, copartnership, or association taxable under the provisions of sections forty, forty-two, forty-three, forty-five, forty-seven, fifty, and fifty-two, neglecting to make the returns required by this chapter, or refusing or neglecting, when required thereto, to submit to the examinations provided for therein, shall forfeit two per cent upon the par value of its capital stock, all which penalties may be recovered by an action of tort, brought in the name of the commonwealth, either in the County of Suffolk or in the county where the corporation is located. If any corporation, company, copartnership, or association fails to pay the taxes required to be paid to the treasurer of the commonwealth under the provisions of said sections forty, forty-two, forty-three, forty-five, forty-seven, fifty, fifty-one, and fifty-two, he may forthwith commence an action of contract in his own name, as treasurer, for the recovery of the same, with interest at the rate of twelve per cent. per annum until the same are paid. All penalties under this section, and under sections seven, forty-seven, fifty, and fifty-two, may also be enforced, and all taxes under said sections forty, forty-two, forty-three forty-five, forty-seven, fifty, fifty-one, and fifty-two, may also be collected by information brought in the Supreme Judicial Court at the relation of the treasurer of the commonwealth, and upon such information the Court may issue
123 an injunction restraining the further prosecution of the business of the corporation, company, copartnership, or association, until all such taxes due or penalties incurred shall be paid, with interest at the rate aforesaid, and costs. In any proceeding under this section the certificate of the tax commissioner or his deputy shall be competent evidence of all determinations made and notices given by him, and of all values, amounts, and other facts required to be fixed or ascertained by him under this chapter.

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(p. 143.) SECT. 56. The lessee of the works, structures, real estate, or machinery of any corporation, company, copartnership, or association taxed under sections forty, forty-two, forty-three, forty-five, forty-seven, fifty, fifty-one, and fifty-two, shall be liable as well as the lessor to pay the amount of said tax, and upon such payment may, in the absence of any agreement to the contrary, retain the same out of the rent of the property, or recover the same in an action against the lessor.

* * * * * * *

(p. 144.) SECT. 60. The tax on corporate franchises herein im-

posed upon any corporation shall not affect nor prevent the imposition and collection of any other tax now authorized, or that may hereafter be authorized, upon any especial privilege, franchise or business enjoyed or exercised by such corporation.

SECT. 61. Any party aggrieved by the decision of the tax commissioner arising under the provisions of sections twenty-five to fifty-eight inclusive, excepting corporations named in section
124 forty-six, may apply to the board of appeal constituted under the provisions of the following section for a correction of the same.

SECT. 62. The treasurer and the auditor of the commonwealth, together with one member of the council to be named by the governor, shall constitute a board of appeal, to which board any party aggrieved by a decision of the tax commissioner upon any matter arising under this chapter, from his decision upon which an appeal is given, may apply within ten days after notice of such decision for a correction of the same. Upon such appeal said board shall, as soon as may be, give a hearing to such party, and shall thereupon decide the matter in question, and notify the tax commissioner and the party appealing; and such decision shall be final and conclusive as to the rights of the parties affected, although payments may have been made as required by the decision of the tax commissioner appealed from. Any over-payment of tax, determined by the decision of said board of appeal, shall be reimbursed from the treasury of the commonwealth."

ACTS AND RESOLVES PASSED BY THE GENERAL COURT OF MASSACHUSETTS IN THE YEAR 1900.

(p. 464.) CHAPTER 468.

"An Act to Authorize the Lease of the Boston and Albany Railroad to The New York Central and Hudson River Railroad Company.

SECTION 1. Subject to the conditions hereinafter mentioned the consent of the Commonwealth is hereby given to the contract and lease of the railroad, franchises and property of the Boston and Albany Railroad Company, and to a supplemental contract in connection therewith for the sale of certain of its assets, which contracts
125 were made and entered into between the directors of the Boston and Albany Railroad Company and the directors of the New York Central and Hudson River Railroad Company on the 15th day of November in the year eighteen hundred and ninety-nine, and which were severally approved and adopted by the votes of the stockholders owning more than two-thirds of the stock of each of said corporations which was represented and voted upon in person or by proxy at special meetings called separately for that purpose.

* * * * * * *

(p. 466.) SECTION 5. The lessee, so long as it has possession of the said railroad under said lease, shall, so far as the operation of said railroad is concerned, be subject to the provisions of all laws now in force or which hereafter may be enacted concerning railroad corporations incorporated within this Commonwealth.

* * * * * * *

(p. 467.) SECTION 11. Upon any failure to comply with and observe the final decrees and mandates of the supreme judicial court of this Commonwealth, provided for in the foregoing sections of this act, or of any federal court of competent jurisdiction, the consent and authority herein given may be revoked and annulled at any time by the general court, notwithstanding any prior failure to observe and comply with any decree or mandate aforesaid. The remedies provided in this and the preceding sections shall be in addition to and shall not repeal any remedies already existing.

SECTION 12. This act shall take effect upon its passage."

Approved July 17, 1900.

126 "EXHIBIT C–1 FOR IDENTIFICATION."

99 MASSACHUSETTS REPORTS, PAGES 148–154.

THE ATTORNEY GENERAL

vs.

BAY STATE MINING COMPANY.

The tax of a certain percentage of the par of its capital stock, imposed by the St. of 1865, c. 283, Sec. 8, on every company or association "having an office or place of business within this Commonwealth for the direction of its affairs or transfer of shares," and "incorporated elsewhere" "for the purpose of engaging without the limits of the Commonwealth in the business of coal mining or other mining, quarrying, or extracting carbonaceous oils from the earth, or for the purpose of purchasing, selling or holding mines or lands without the Commonwealth," is warranted by the Constitution of the Commonwealth, and is not in conflict with the Constitution of the United States; nor was said sec. 8 in any respect repealed or annulled by the St. of 1866, c. 291.

Information filed December 13, 1867, on the St. of 1865, c. 283, sec. 14, at the relation of the treasurer and receiver-general of the Commonwealth, seeking a decree for payment by the defendants, a corporation organized under the law of Michigan for the purpose of engaging in the business of mining copper in that State, of taxes in 1866 and 1867, under the St. of 1865, c. 283, sec. 8, the material part of which is printed in the margin;* and for an injunc-

*"Every corporation chartered by this Commonwealth, or organized under the general laws, for the purpose of engaging, without the limits of the Commonwealth, in the business of coal mining or other mining, quarrying or extracting carbonaceous oils from the earth, or for the purpose of purchasing, selling or holding mines or lands without the Commonwealth, and every such company or association, incorporated elsewhere, and having an office or place of business within the Commonwealth for the direction of its affairs or transfers of shares, shall, semi-annually, between the first and the tenth day of June and December, make a return, under the oath of its treasurer, or president, to the tax commissioner, of the whole amount of its capital stock, as fixed by the corporation, on the first day respectively of May and November next preceding, and pay to the treasurer of the Commonwealth a tax of one twentieth of one per cent. upon said capital stock at the par thereof."

127 tion against further prosecution of business in the Commonwealth by the defendants, until the same should be paid with interest.

The information alleged the maintenance by the defendant corporation of an office or place of business, namely, the office of its treasurer, in Boston, for the direction of its affairs and transfer of shares; and the making of returns by its treasurer to the tax commissioner in June and December, 1866, and June, 1867, in conformity with the statute; that in truth and fact the par value of its capital stock as fixed on May 1 and November 1, 1866, and May 1, 1867, was thus returned; and that "by reason thereof said corporation became liable and was bound to pay to the treasurer of the Commonwealth" the taxes alleged being one-twentieth of such par value at the three dates last named.

The answer substantially admitted the facts alleged in the information; but denied "that said corporation owes the taxes mentioned in said information to said Commonwealth and interest thereon, or any part of said taxes and interest, or is or was liable and bound to pay to the treasurer of said Commonwealth said taxes;" alleged that the defendant corporation "is a foreign corporation owning real estate in the state of Michigan, and employing its capital stock in the working of a mine in said state, that said capital stock is owned in part by citizens of states other than the
128 state of Massachusetts, that nearly all the contracts for labor at said company's mine and for materials purchased for use at said mine are entered into in Michigan, and drafts for the payment of the same, drawn by the agent of the company at the mine on the treasurer of the company, residing in Boston, are delivered to and received by the laborers, and parties furnishing materials, as payment;" further denied "that said Commonwealth has the right or power, under the Constitution of the United States, or under the Constitution of the said Commonwealth, to tax said corporation, said corporation being a foreign corporation and receiving all its corporate powers and privileges from the state of Michigan," and finally alleged "that the provisions of said St. of 1865, c. 283, so far as it is pretended that the same are applicable to said defendants in requiring the payment of a tax to the treasurer of said Commonwealth are repealed by the provisions of the St. of 1866, c. 291.

The case was reserved by Foster, *J.*, on the information and answer for determination by the full court.

C. Allen, Attorney General, and J. C. Davis, for the Commonwealth, besides cases cited for the defendants and in the opinion, cited Tremont Bank *v.* Boston, 1 Cush. 145; Angell & Ames on Corporations, sec. 486a; DeGroot *v.* Van Duzer, 20 Wend. 390; Bank of Augusta *v.* Earle, 13 Pet. 589; Corfield *v.* Coryell, 4 Wash. C. C. 380; Blackstone Manufacturing Co. *v.* Blackstone, 13 Gray, 488; McCulloch *v.* Maryland, 4 Wheat. 429; Providence Bank *v.* Billings, 4 Pet. 564; Nathan *v.* Louisiana, 8 How. 82; Biddle *v.* Commonwealth, 13 S. & R. 409; Commonwealth *v.* Milton, 12 B. Monr. 212; Fire Department *v.* Noble, 3 E. D. Smith, 440;
129 Fire Department *v.* Wright, *Ib.* 453; State *v.* Delaware, Lackawanna & Western Railroad Co., 1 Vroom, 473.

J. G. Jackson, for the defendants. 1. The Commonwealth has no authority to tax the capital stock of a foreign corporation. The legislature has power to impose "proportional and reasonable assessments, rates and taxes, upon all the inhabitants of, and persons resident and estates lying within the Commonwealth;" and also to impose "reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities whatsoever, brought into, produced, manufactured or being within the same." Const. of Mass., part 2, c. 1, sec. 1, art. 4. But this gives no authority to impose taxes on property or persons not subject to their jurisdiction. The capital stock, as such, of the defendant corporation, is beyond its jurisdiction.

In Portland Bank *v.* Apthorp, 12 Mass. 252, and Commonwealth *v.* Hamilton Manufacturing Co., 12 Allen, 298, the defendants being domestic corporations, it was held that under the term "commodity" their charters were included, and that the legislature, which created and sold these commodities, might, as the price of the commodity, in the one case levy an excise or duty each year on the franchise of the bank, measured by the capital stock which it permitted the bank to hold, and in the other case measure the value of the commodity sold by the market value of the shares. But in the case at bar, though the legislature may compel the defendant corporation to pay a license for maintaining an office for the transaction of part of its business in Massachusetts, yet, having no control over the charter, it cannot levy a tax on the capital stock, all of which
130 is employed in another state. Massachusetts does not grant the defendant's franchise; and so cannot tax it. The principle that a state, in order to tax a corporation on its franchise, must have granted the charter, or have the corporate property within its limits, seems to be expressly recognized by the St. of 1864, c. 208, secs. 6, 9, and by the very St. of 1865, c. 283, secs. 5, 7, relating to railroad and telegraph companies extending beyond the limits of Massachusetts or incorporated by other states. See also Eastern Bridge *v.* The County, 9 Barr, 415.

The real and personal estate of the corporation may be taxed to the corporation by any power within whose jurisdiction it may be found; and the interest of the shareholders is personal to them, and may be taxed to them in their places of domicil, whether the shares so held by them are shares of foreign or domestic corporations, and notwithstanding, in the case of foreign corporations, that such corporations have paid taxes on their franchises and corporate property to the power which created them. Gordon *v.* Appeal Tax Court, 3 How. 133; Angell & Ames on Corporations, sec. 458; Dwight *v.* Mayor & Aldermen of Boston, 12 Allen 316; Commonwealth *v.* Berkshire Insurance Co. 98 Mass. 25. But if Massachusetts has jurisdiction for taxation over such of the shares of this Michigan corporation as are held by citizens of Massachusetts, it does not follow that it has therefore such jurisdiction over all the shares of the capital stock of the corporation, part of which are owned by citizens of other states, and that it may so tax property in other states belonging to citizens of other states.

2. The St. of 1865, c. 283, on which this information is based, so far as applicable to the taxation of the capital stock of foreign mining corporations to such corporations, and not to the individ-
131 ual holders of shares in such stock, is repealed by the statute of 1866, c. 291, sec. 2, and the power to tax the shares in such corporations remitted to the towns and cities where the stockholders reside.

3. By the answer it appears that nearly all the contracts for labor at the mine in Michigan, and for materials purchased, are entered into in Michigan, and drafts for payments in fulfillment of these contracts are drawn on the treasurer of the company. The information asks the court to enforce the statute by enjoining the treasurer from paying these drafts; which would be in contravention of the Const. of the U. S., art. 1, sec. 10, forbidding any state from passing any law impairing the obligation of contracts.

WELLS, *J.*:

The defence in this suit seems to rest upon the supposition that the existence and organization of the corporation, the functions and capacities with which it is endowed by the law creating it, are alone what constitute the franchise or "commodity," which is the subject of the tax or excise imposed by the St. of 1865, c. 283. If it were so, there would be much force in the argument that, when these are derived exclusively from the authority of another state, they are not proper subjects of state taxation here.

But we think this is a too limited view of the matter. It is not merely the creation of corporate functions and privileges, or the conferring of rights and franchises by the legislature, which entitles the state to tax the possessor of such privileges and rights. The exercise of powers or privileges, and even of occupations without especial powers or privileges, may be equally subjected to such taxation, under the constitutional authority to "impose and levy reasonable duties and excises." It was so considered in the case of
132 Portland Bank *v.* Apthorp, 12 Mass. 252; and the tax of one per cent. laid upon the capital stock of the bank, was justified upon principles equally applicable to individuals transacting similar business, and to brokers, factors, auctioneers, &c. The tax was not sustained on the ground that the corporation derived its existence from the state which imposed the tax; on the contrary, one principal question in that case was, whether, by the charter, the state had not conferred upon the bank the privilege of doing the business for which it was created, without restriction, so as to exempt the corporation from the requisition of any tax or duty afterwards levied upon the exercise of that privilege.

That decision is sufficient for the present case. The tax is, indeed, in form, levied upon the capital stock of the corporation. But it is not merely the franchise of incorporation that is the basis of the tax, nor is it the capital, regarded merely as property. In case of domestic corporations, it is based upon a valuation which involves an estimate of all the advantages, present and prospective, which the stock is supposed to derive from the combination of capital and the

exercise of all the rights and privileges enjoyed by the corporation in the conduct of its business. Commonwealth *v.* Hamilton Manufacturing Co. 12 Allen, 298.

When the exercise of corporate functions, authorized by the state, is extended beyond the limits of the state, as in railroads and telegraph lines, the tax is apportioned accordingly. In the case of mining companies whose mines are without the state, the tax is limited by the "par" of the stock, and the tax upon foreign companies is founded upon the express consideration of "having an office or place of business within the Commonwealth for the direction of its affairs or transfer of shares." A mining corporation
133 which comes within the terms of this provision has its domicil of business within the Commonwealth, as completely as one that is organized under our General Statutes for the prosecution of a like enterprise. A corporation which seeks, by its agents, to establish a domicil of business in a state other than that of its creation, must take that domicil, as individuals are always understood to do, subject to the responsibilities and burdens imposed by the laws which it finds in force there. The state may deny to foreign corporations the right to transact their business, hold property, or exercise any corporate function whatever within its limits. Or it may permit them to exercise such privileges upon terms prescribed by law, as has long been done in relation to insurance companies. Erie Railway Co. *v.* New Jersey, 2 Vroom 531. The provisions of the statute in question are founded upon this right of exclusion or of conditional admission. Exclusion is the remedy provided to enforce compliance. The very defence to the suit implies the enjoyment of valuable rights and privileges within the Commonwealth, which a foreign corporation can only exercise by comity and the permission of the state.

The court are all of opinion that the tax upon the defendant corporation is legal; that it is warranted by the Constitution of the Commonwealth, and is not in conflict with any provision of the Constitution of the United States, and that sec. 8 of the St. of 1865, c. 283, is in no respect repealed or annulled by the St. of 1866, c. 291.

The Commonwealth is therefore entitled to an injunction restraining the further prosecution of the business of the defendant corporation within the Commonwealth, excepting the payment of debts already contracted, until all taxes due under said act shall be paid with interest and costs.

134 "EXHIBIT C-1 FOR IDENTIFICATION" (Con't).

33 FEDERAL REPORTER, PAGE 129.

ATTORNEY-GENERAL
v.
WESTERN UNION TELEGRAPH COMPANY.

(Circuit Court, D. Mass., November 28, 1887.)

1. Telegraph Companies—Taxation—Power of State.

Pub. St. Mass., c. 13, sec. 40 provides that every railroad and telegraph company shall pay annually a tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock, after deducting from such valuation such portion as is apportionate to the length of the line lying without the state; and also an amount equal to the value of the real estate and machinery located and subject to local taxation within the state. Held, that the right to tax telegraph companies under this statute is not impaired by Rev. St. W. S. secs. 5263–5265, conferring certain privileges on telegraph companies.

2. Constitutional Law—Interstate Commerce—Taxation of Telegraph Companies.

A tax levied under Pub. St. of Mass., c. 13, sec. 40, providing for the taxation of railroad and telegraph companies is not void as repugnant to the Const. U. S., Art. 1, sec. 8, which gives congress power to regulate commerce between the several states.

(Sub-note 1. Respecting interstate commerce in general see Pearson *v.* Distillery Co. (Iowa), 34 N. W. Rep. 1 and note.)

In Equity.

Harvey N. Shepard, Ass't Att'y General, for complainant.
Geo. S. Hale, for defendant.

COLT, *Justice:*

135 This is an information filed by the attorney general of Massachusetts under section 54, chapter 13, of the Public Statutes of Massachusetts, to collect a tax claimed to be due, and for an injunction restraining the defendant from the further prosecution of its business until such tax is paid.

The defendant is a telegraph company, organized under the laws of the State of New York, for the purpose of business and profit, and having a capital stock divided into shares. On or about June 12, 1867, the company filed its written acceptance with the postmaster general of the United States of the restrictions and obligations required by the act of congress of July 24, 1866, relating to telegraphs.

Rev. St. secs. 5263–5269. By section 6263 it is provided that any telegraph company organized under the laws of any state shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States; over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under or across the navigable streams or waters of the United States. The information was originally filed in the state court April 27, 1886, and removed to this court by the defendant. On May 1, 1885, the defendant owned or controlled, under lease or otherwise, 146,052.60 miles of telegraph line, of which 2,833.05 were situate within the state of Massachusetts. In September, 1885, the tax commissioners, in the manner required by the laws of the state, estimated the fair cash valuation of the stock of the corporation on May 1, 1885, at $47,500,000, and allowed as credits for shares held by the company unissued and stocks in other companies outside of its system $8,773,622.70, leaving $38,713,924. The commissioner considered the valuation of the corporate franchise of
136 the defendant subject to taxation in the state to be $750,952, and he assessed a tax thereon of $10,618.46. More than 2,334.55 miles of the line within the state are over, under or across post roads, but the commissioner ignored this fact. The defendant has continually transmitted messages over its lines on said post roads between the several departments of the United States Government at rates fixed by the post-master general as required by the act of July 24, 1866. (Rev. St. sec. 5266.) It is impossible for the company to determine what portion of any sums received were for services performed in the state in the transmission through the state or any portion thereof of messages received or delivered out of it, or what portion of any sums received were for services not on lines of said post roads; but approximately 70% of the receipts were for messages received and delivered out of the state. The defendant on May 1, 1885, owned a large amount of real estate subject to local taxation out of the state of Massachusetts on which there was assesed and paid more than $48,000 of taxes. In the assessment of the tax herein complained of no allowance or deduction was made for this, and in ascertaining the valuation of the defendant's franchise for the purposes of taxation no account was taken of said real estate or buildings or the taxes paid thereon. The position taken by the defendant is that this tax levied under Chap. 13 of the Pub. Statutes of Massachusetts is illegal—*first:* Because of its operation and effect upon a franchise granted by the United States and used for its purposes and benefit; *second:* because it is a tax upon interstate or foreign commerce; *third:* because it *it* is in effect levied upon real estate located and taxed in another state. There is nothing in the act of July 24,
1866, conferring certain privileges on telegraph companies
137 who shall choose to take the benefit of its provisions, which impairs the right of a state to tax the property or franchise of the corporation in the manner exercised by the state of Massachusetts in the present case; nor is such a tax void as repugnant to sec. 8 of art. 1 of the Constitution, which gives congress power to

regulate commerce with foreign nations and among the several states.

In Telegraph Co. *vs.* Texas, 105 U. S. 460, the Supreme Court held a state statute imposing a specific tax on each message which it transmitted beyond the state, or which a public officer sends over its lines on business of the United States was void so far as it was a tax on interstate business, or a tax by a state on the means employed by the United States to execute its constitutional powers. It will be observed that this was a direct tax on each message sent out of the state as well as a direct tax on messages sent by the government. In the present case, however, the tax is imposed upon the shares of capital stock which represent the property and franchise of the corporation. Every tax on the property or franchise of a telegraph company may operate to increase the cost of messages sent, but that does not make such a tax invalid. In the case just referred to Chief Justice Waite, speaking for the court, says: "The Western Union Telegraph Company having accepted the restrictions and obligations of this provision by congress, occupies in Texas the position of an instrument of foreign and interstate commerce and of a government agent for the transmission of messages on public business. Its property in the state is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper manner on account of its occupation and its business." The precise question now presented is
138 "whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out of the state, or sent by public officers on the business of the United States."

It was this last question that was determined in the negative. In the Delaware Railroad Tax Case, 18 Wall. 206, an act of the legislature of Delaware imposing a tax quite similar to the one now complained of was held not to conflict with the power of congress to regulate commerce. The court in that case observes: "The state may impose taxes on the corporation as an entity existing under its laws as well as upon the capital stock of a corporation or its separate corporate property. And the manner in which its valuation shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the state; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction."

The question of what constitutes a tax upon foreign or interstate commerce had frequently come before the Supreme Court for adjudication and I find no case which sustains the view taken by the defendant in this case. The question is carefully reviewed in the recent cases of Fargo *v.* Michigan, 121 U. S. 230; 7 Sup. Ct. Rep. 857, and Steamship Co. *vs.* Pennsylvania, 122 U. S. 326; 7 Sup. Ct. Rep. 1118.

Sec. 40, Chap. 13, Pub. Stat. of Massachusettts provides that every corporation embraced in the provision of sec. 38 shall pay a tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock at a certain rate deter-
139 mined as therein set forth, deducting in the case of railroads and telegraph companies whose lines extend beyond the limits

of the commonwealth such portion of the whole valuation of their capital stock as is proportional to the length of that part of their line lying within the commonwealth; and also an amount equal to the value, as determined by the tax commissioner, of their real estate and machinery located and subject to local taxation within the commonwealth; in case of other corporations an amount shall be deducted equal to the value of their real estate and machinery subject to local taxation wherever situate. The deductions in the case of corporations generally of all real estate and machinery wherever situate and in the case of railroad and telegraph companies whose lines extend beyond the limits of the commonwealth of only the real estate and machinery lying within the state, is a question of legislative discretion, and no valid ground has been suggested upon which this court for this reason has a right to declare a tax so levied invalid in whole or in part. I think a decree should be entered for the complainant and that an injunction as prayed for should be granted unless the amount taxed is paid by the defendant within 30 days from the entry of a decree in the cause. Decree for complainant.

United States Reports, October Term, 1887, No. 125, pages 530-555.

WESTERN UNION TELEGRAPH COMPANY
v.
THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

No. 1325. Argued February 15, 1888. Decided March 19, 1888.

140 The privilege conferred upon telegraph companies by Rev. Stat. sec. 5263 carries with it no exemption from the ordinary burdens of taxation in a State within which they may own or operate lines of telegraph.

The laws of Massachusetts impose a tax upon the Western Union Telegraph Company on account of the property owned and used by it within that State, the value of which is to be ascertained by comparing the length of its lines in that State with the length of its entire lines; and such a tax is essentially an excise tax, and is not forbidden by the fact of the acceptance on the part of the company of the rights conferred on telegraph companies by Rev. Stat. sec. 5263, nor by the commerce clause of the Constitution.

The principles established by the statutes of Massachusetts for regulating the taxation of corporations doing business within its limits, whether domestic or foreign, do not appear to be unfair or unjust.

A state statute which authorizes an injunction to be issued to restrain a corporation organized under the laws of another State, whose taxes are in arrear, from prosecuting its business within the State until the taxes are paid, is void so far as it assumes to confer power upon a court to so restrain a telegraph company which has ac-

cepted the provisions of Rev. Stat. sec. 5263 from operating its lines over military and post roads of the United States.

In Equity. The bill was filed by the Attorney General of the Commonwealth of Massachusetts, at the relation of the Treasurer of that State, and on behalf of the Commonwealth, in the Supreme Judicial Court of that State on the 27th of April, 1886. It averred that certain proceedings had been taken in accordance with law and under the Statutes of that State, to assess taxes in that State
141 in the year 1885 upon the capital stock of the Western Union Telegraph Company, a corporation owning, controlling, and using, under lease, or otherwise, lines of telegraph within that Commonwealth for purposes of business or profit. The provisions in the Constitution and laws of Massachusetts which were relied upon are printed in the margin.*

(*) 1. *Extract from the Constitution of Massachusetts.*

Part 2, Ch. 1, Sect. 1, Art. 4, of the Constitution gives the Legislature power "to impose and levy proportional and reasonable assessments, rates and taxes, upon all the inhabitants of, and persons resident, and estates lying within the said Commonwealth," and also "to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise and commodities whatsoever, brought into, produced, manufactured or being within the same."

2. *Extracts from the Public Statutes of Massachusetts.*

"Chapter 13, Sect. 38. Every corporation chartered by the Commonwealth, or organized under the general laws, for the purposes of business or profit, having a capital stock divided into shares, excepting banks whose shares are otherwise taxable under this chapter, and except those specified in sections forty-three and forty-six, shall annually, between the first and the tenth day of May, return to the tax commissioner, under the oath of its treasurer, a complete list of its shareholders, with their places of residence, the number of shares belonging to each on the first day of May, the amount of the capital stock of the corporation, its place of business, the par value and market value of the shares on said first day of May. Such return shall, in the case of stock held as collateral security, state not only the name of the person holding the same, but also the name of the pledger and his residence. The returns shall also contain a statement in detail of the works, structures, real estate and machinery owned by said corporation and subject to local taxation within the commonwealth and of the location and value thereof. Railroad and telegraph companies shall return the whole length of their lines, and the length of so much of their lines as is without the commonwealth; other corporations required to make a return under this section shall also return the amount, value and location of all works, structures, real estate, and machinery owned by them and subject to local taxation without the commonwealth: *provided*, that nothing herein contained shall exempt any corporation from making all returns required by its charter.

"Sect. 39. The tax commissioner shall ascertain, from the returns

or otherwise, the true market value of the shares of each
142 corporation included in the provisions of the preceding section, and shall estimate therefrom the fair cash valuation of all of said shares constituting its capital stock on the first day of May next preceding, which shall be taken as the true value of its corporate franchise for the purposes of this chapter. He shall also ascertain and determine the value and amount of all real estate and machinery owned by each corporation, and subject to local taxation, and of the deductions provided in the following section; and for this purpose he may take the amount or value at which such real estate and machinery are assessed at the place where the same are located as the true amount or value; but such local assessment shall not be conclusive of the true amount or value thereof.

"SECT. 40. Every corporation embraced in the provisions of section thirty-eight shall annually pay a tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock, as determined in the preceding section, after making the deductions provided for in this section, at a rate determined by an apportionment of the whole amount of money to be raised by taxation upon the property in the commonwealth during the same current year, as returned by the assessors of the several cities and towns under section eight'-six of chapter eleven, upon the aggregate valuation of all the cities and towns for the preceding year, as returned under sections fifty-four and fifty-five of said chapter: *provided,* that in case the return from any city or town is not received prior to the twentieth day of August, the amount raised by taxation in said city or town the preceding year, as certified to the secretary of the commonwealth, may be adopted for the purpose of this determination; and *provided, further,* that the amount of tax assessed upon polls the preceding year, as certified to the secretary, may be taken as the amount of poll tax to be deducted from the whole amount to be raised by taxation, for the purpose of ascertaining the amount to be raised by taxation upon property. From the valuation, ascertained and determined as aforesaid, there shall be deducted,—*First,* in case of railroad and telegraph companies, whose lines extend beyond the limits of the commonwealth, such portion of the whole valuation of their capital stock, ascertained as aforesaid, as is proportional to the length of that part of their line lying without the commonwealth, and also an amount equal to the value as determined by the tax commissioner, of their real estate and machinery located and subject to local taxation within the commonwealth: *second,* in case of other corporations, included in section thirty-eight of this chapter, an amount equal to the value, as determined by the tax commissioner, of their real estate and machinery, subject to local taxation, wherever situated: *Provided,* that, whenever the charter of a corporation pro-
vides a different method of ascertaining the valuation of its
143 corporate franchise for the purposes of this chapter, the same shall be ascertained in the method provided in such charter."

"SECT. 42. Every corporation or association chartered or organized elsewhere, which owns, or controls and uses, under lease or

otherwise, a line of telegraph within this commonwealth, shall make all the returns prescribed in section thirty-eight to be made by telegraph companies within the commonwealth excepting the list of its shareholders; and shall annually pay a tax at the same rate, and to be ascertained and determined in the same manner as is provided in section forty; and all telegraph lines within the commonwealth controlled and used by such corporation or association, shall for the purposes of this chapter, be taken and considered as part of its own lines."

"SECT. 53. The tax commissioner shall, as soon as may be after the first Monday in August in each year, notify the treasurer of each corporation, company, copartnership, or association liable thereto, of the amount of its tax under sections twenty-five, forty, forty-two, forty-five, forty-seven, fifty, and fifty-two, to become due and payable to the treasurer of the commonwealth within thirty days from the date of such notice: *provided*, that it shall not be due and payable earlier than the first day of November. Such notice shall also state that within ten days after the date thereof the said corporation, company, copartnership, or association may apply for a correction of said tax, and be heard thereon before the board of appeal hereinafter established.

"SECT. 54. Any corporation, company, copartnership, or association taxable under the provisions of sections forty, forty-two, forty-three, forty-five, forty-seven, fifty, and fifty-two, neglecting to make the returns required by this chapter, or refusing or neglecting, when required thereto, to submit to the examinations provided for therein, shall forfeit two per cent. upon the par value of its capital stock; all which penalties may be recovered by an action of tort, brought in the name of the commonwealth, either in the county of Suffolk or in the county where the corporation is located. If any corporation, company, copartnership, or association fails to pay the taxes required to be paid to the treasurer of the commonwealth under the provisions of said sections forty, forty-two, forty-three, forty-five, forty-seven, fifty, fifty-one, and fifty-two, he may forthwith commence an action of contract in his own name, as treasurer, for the recovery of the same, with interest at the rate of twelve per cent. per annum until the same are paid. All penalties under this section, and under sections seven, forty-seven, fifty, and fifty-two, may also be enforced, and all taxes under said sections forty, forty-two, forty-three, forty-five, forty-seven, fifty, fifty-one, and fifty-two, may also be collected by information brought in the supreme judicial court at the relation of the treasurer of the commonwealth, and upon such information the court may issue an injunction restraining the further prosecution of the business of the corporation, company, copartnership, or asso-
144 ciation, until all such taxes due or penalties incurred shall be paid, with interest at the rate aforesaid, and costs. In any proceeding under this section the certificate of the tax commissioner or his deputy shall be competent evidence of all determinations made and notices given by him and of all values, amounts, and other facts required to be fixed or ascertained by him under this chapter."

"SECT. 61. Any party aggrieved by the decision of the tax commissioner arising under the provisions of sections twenty-five to fifty-eight inclusive, excepting corporations named in section forty-six, may apply to the board of appeal constituted under the provisions of the following section for a correction of the same."

SECT. 62. The treasurer and the auditor of the commonwealth, together with one member of the council to be named by the governor, shall constitute a board of appeal, to which board any party aggrieved by a decision of the tax commissioner upon any matter arising under this chapter, from his decision upon which an appeal is given, may apply within ten days after notice of such decision for a correction of the same. Upon such appeal said board shall, as soon as may be, give a hearing to such party, and shall thereupon decide the matter in question, and notify the tax commissioner and the party appealing; and such decision shall be final and conclusive as to the rights of the parties affected, although payments may have been made as required by the decision of the tax commis-ioner appealed from. Any overpayment of tax, determined by the decision of said board of appeal, shall be reimbursed from the treasury of the commonwealth."

"CHAPTER 109, SECTION 1. Every company incorporated for the transmission of intelligence by electricity shall possess the powers and privileges, and be subject to the duties, restrictions, and liabilities, prescribed in this chapter."

"SECT. 2. Each company may, under the provisions of the following section, construct lines of electric telegraph upon and along the highways and public roads, and across any waters within the commonwealth, by the erection of the posts, piers, abutments, and other fixtures (except bridges) necessary to sustain the wires of its lines; but shall not incommode the public use of highways or public roads, nor endanger or interrupt the navigation of any waters."

"SECT. 3. The mayor and aldermen or selectmen of a place through which the lines of a company are to pass shall give the company a writing specifying where the posts may be located, the kind of posts, and the height at which and the place where the wires may run. After the erection of the lines, having first given the company or its agents opportunity to be heard, they may direct any alteration in the location or erection of the posts, piers, or abutments, and in the height of the wires. Such specifications and decisions shall be recorded in the records of the city or town."

145 The nature of the proceeding, in the valuation of the property of the company for the purposes of the assessment of the tax, are sufficiently stated in the Report of the Examiner *infra*.

The bill averred that the taxes had not been paid, and were still due and owing to the Commonwealth, and prayed the court "to order and decree that said sum due for taxes as aforesaid shall be paid to said Commonwealth by the said corporation, with interest thereon, together with the costs of this information, and to grant unto your informant a writ of injunction, issuing out of and under the seal of this honorable court, to be directed to the said corporation and its officers, agents, and servants, commanding them and each of them absolutely to desist and refrain from the further prosecution of the business of said corporation until said sums, due to the said Commonwealth as aforesaid for taxes as aforesaid shall have been fully paid, with interest and costs," and for further and other relief.

On motion of the defendant the cause was, on May 13, 1886, removed to the Circuit Court of the United States, and on the 29th day of the same May the answer of the defendant was filed in that court.

The answer set forth that the defendant was a corporation organized in the State of New York, and under the laws of that State; that it owned, controlled, and used many lines of telegraph in various parts of the United States, and in the State of Massachusetts, largely in that State over and along the post roads of the United States which had been declared to be such and over, under, and across navigable waters of the United States in or adjoining that State, and that on the 5th day of June, 1867, it had accepted the provisions and obligations of the act of July 24, 1866, 14 Stat. 221, c. 230

146 (now Rev. Stat. sec. 5263); (*) that thereby it became entitled to construct and maintain its lines over the post roads and over, under, and across the navigable waters of the United States, and became bound to transmit the telegrams of the United States over its lines at rates to be fixed by the Postmaster General, and that no state legislation could prevent its occupation of post roads for that purpose; that its lines extend to and from Massachusetts to other states, and to Washington, and connect with the lines of other companies doing business in this country and outside of the United States and beyond the seas; that while it was operating its lines in Massachusetts it was called upon to make returns of its capital stock, &c., to the tax commissioner of the State according to the provisions of secs. 38, 39, 40, 41, and 42 of c. 13 of the Public Statutes of the State, and made a return as follows:

(*) See *infra*, page 547, for this statute.

"Western Union Telegraph Company.

"TREASURER'S OFFICE, NEW YORK, *June* 25, 1885.

"Hon. Daniel A. Gleason, tax commissioner of the Commonwealth of Massachusetts.

"SIR: I, Roswell H. Rochester, treasurer of the Western Union Telegraph Company, hereby return that on the first day of May, 1885, said corporation held its principal place of business at the City of New York.

"Its capital stock was	$80,000,000.00
The whole number of its shares was 800,000.	
The par value of each share was	100.00
The market value of each share was	59.37½
The value of the real estate owned by the corporation without the State of Massachusetts was	3,058,933.82
147 The value of the real estate owned by the corporation within the State of Massachusetts was nothing.	
The total number of miles of line owned or leased was 146,052.60.	
Of which the number of miles (not on post roads of the United States and excluding 2,334.55 miles which were on post roads of the United States) within the State of Massachusetts was 498.50.	
Total property, 800,000 shares, at $59.37½ per share	47,500,000.00
This includes—	
Real Estate	3,058,933.82
Two hundred and nine three-fourth shares held by this company unissued, at $59.37½	12,453.90
Stocks in other companies outside of our system, not included in above statement of miles of line.	8,773,622.70
Balance value of 146,052.60 miles of line	35,654,989.58
Value, at same rate, of said 498.50 miles as the valuation of the corporate franchise of said company for taxation under the laws of Massachusetts	121,695.97

"This return includes the lines and property of the American Union Telegraph Company, the Franklin Telegraph Company, the Mutual Union Telegraph Company, and the Gold and Stock Telegraph Company as part of the Western Union lines.

"Respectfully yours, R. H. ROCHESTER,
Treasurer."

148 The answer then set forth the action of the tax commissioner upon this return and respecting the valuation of the property of the company for the purposes of taxation (*); and continued:

(*) For these proceedings see the Report of the Examiner, *infra*, pp. 539, 542.

"And this respondent does not deny but admits that its property in said State of Massachusetts is subject to taxation the same as other property, and that it may be taxed in a proper way thereon, yet it respectfully submits and avers that this respondent does not derive its existence from the laws of said State, or derive the right to have and exercise its said franchises, rights and privileges from said State, or hold them subject to its control, and that said franchise tax is clearly not a tax on its property in any legal sense, and cannot be held valid as such; that it is in the nature of an excise on the exercise of all the franchises, rights and privileges enjoyed by this respondent in the conduct of its business, and a tax on its operations in such exercise; that, while it is claimed by the officers of said State and by said attorney general that the laws imposing said tax are founded on the alleged right of said State to refuse to this respondent the right or permission to transact its business or exercise its functions, franchises, rights and privileges within said State, except for such price and on such terms and conditions, including the payment of such taxes as said State may see fit to prescribe and assess, and to compel the performance of, and to exclude this respondent from such transaction or exercise if the same are not performed and obeyed:

"Yet this respondent avers that said franchise tax has not and cannot have this or any legal foundation, and that it includes and is a tax or assessment on the rights, privileges and franchises
149 granted and secured to this respondent by the United States by the said act of Congress, and on the use thereof by this respondent as an instrument of commerce and as a government agent for the transmission of public business by means thereof, and on its operation in said State, which said State cannot limit, control, refuse, or tax.

"That even if said tax could in any form be so properly levied and assessed on the use of such rights and privileges for other purposes, which this respondent denies, it is not only impossible in this case to indicate or designate the portion of the burden of said franchise tax on said use as an instrument of commerce and as a government agent or on any use for other purposes, but that the mode of valuation thereof specifically prescribed by said act does in terms include and designate as a subject of taxation the franchise exercised on that portion of this respondent's lines constructed, maintained and used in the exercise and enjoyment of said rights and privileges, and that the said tax bears upon the whole machine without distinction and indistinguishably as well upon the faculty of receiving and transmitting the messages of the government of said United States as on that of receiving and transmitting messages of individuals, and as well upon the faculty of receiving and transmitting through said State messages sent and received in and for the purposes of foreign and interstate commerce, as upon that of receiving and transmitting other messages wholly within said State.

"And this respondent further avers that if said franchise tax could in form be legally so levied and assessed as to operate upon only something legally subject to taxation by said State by any mode of

estimate or valuation resembling that prescribed by said laws,
150 based upon a valuation of its shares, deducting real estate locally taxed in said State, it would be and is unjust and not proportional not to deduct from said valuation the amount of real estate owned by and subject to local taxation and actually taxed out of said State, both because the laws of said State allow such deduction from the valuation under said laws for like taxation of the franchises of other corporations organized or chartered within and doing business within and without said State, and because otherwise said State would assume and does assume in effect to tax and assess real estate situated in and subject to taxation and actually taxed by other States and jurisdictions."

The plaintiff filed a replication to this answer; whereupon the cause was referred to Francis S. Fiske, Esq., "as Examiner, to take and report the evidence of both parties therein, and such questions of law arising thereon as either party shall desire." The Examiner's report was filed May 4, 1887, as follows:

"I, Francis S. Fiske, having been appointed by the Court a special examiner in the above-named case, report:

"That the information was filed in the Supreme Judicial Court of the State April 27, 1886, and removed to this court by the defendant; that the defendant is a telegraph company organized under the laws of the State of New York before the passage of the act of the Congress of the United States of July twenty-fourth, eighteen hundred and sixty-six, entitled 'An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes' (Rev. Stat., sec. 5263, *et seq.*), and is a corporation organized for purposes of
151 business and profit, having a capital stock divided into shares, which filed with the Postmaster-General of the United States its written acceptance of the restrictions and obligations required by law in accordance with said act on or about the twelfth day of June, 1867, and has ever since been in existence and operation.

"That on and before and since the first day of May, 1885, it has owned, controlled and used, under lease or otherwise, a line or lines of telegraph within said Commonwealth as part of a system of 146,052 and 60/100 miles of line extending throughout the United States, part of Canada, and to Cuba and England by submarine ocean cable, connecting with lines owned and established by the Government of the United States for public purposes.

"That on the sixteenth day of September, in said year 1885, after notice had been given to said Commonwealth of said filing and of other matters mentioned in the notice hereto appended, as below stated, and a return made by said company, under section 42 of chapter 13 of the Public Statutes of said Commonwealth, copies of which notice and return are appended (see pp. 536, 537, *supra*), the tax commissioner of said Commonwealth, in the manner required by its laws, estimated the fair cash valuation of all the shares constituting the capital stock of said corporation on said first day of May at $47,500,000, and allowed as credits to said corporation out of said $47,500,000 the sum or value of $8,786,076.

For 209¾ shares held by the company unissued, at $59.37½	$12,453.90
For stock in other companies outside of its system not included in above statement of miles of line..	8,773,622.70
	$8,786,076.60

152 "And determined the total number (or whole length) of the miles of line of said defendant to be 146,052.60 as aforesaid and 143,219.55 miles thereof, which included said cables, to be beyond the limits of said Commonwealth.

"That the rate determined under the fortieth section of said thirteenth chapter of said Public Statutes for the taxation of the corporate franchise therein mentioned was, in and for the year 1885, $14.14 each for each $1,000 of valuation.

"That said commissioner, being of opinion that the valuation of the corporate franchise of said defendant for taxation by said Commonwealth was to be ascertained by deducting

from said	$47,500,000.00
The said	8,786,076.00
Thus leaving	$38,713,924.00
And then taking as the total number of said line or lines	146,052.60
And as the number thereof in said Commonwealth..	2,833.05

without regard to the question whether any thereof were or were not on post roads, declared such by law, or navigable streams or waters of the United States, considered that the valuation of the corporate franchise of said defendant subject to be taxed in said Commonwealth at said rate was $\frac{2,833.05}{140,052.60}$ of said $38,713,924, or in all ($750,952) seven hundred and fifty thousand nine hundred and fifty-two dollars, and assessed a tax thereon of ($10,618.46) ten thousand six hundred and eighteen and 46/100 dollars to said company.

"That in fact more than 2,334.55 miles of said line within said Commonwealth, part of said 2,833.05 miles, were on, over, under, or across said post roads—that is to say, railroads or highways
153 made by law such post roads—or such streams or waters.

"That before and during said year and since said defendant has continually transmitted over said lines on said post roads, streams, or waters between the several departments of the United States government and their officers and agents or as provided by sec. 221 of the Revised Statutes of the United States, at rates fixed by the Postmaster-General, as required by said act of Congress or title LXV. of said section, telegraphic communications and messages for the government of the United States, including those for the signal service relating to the weather, storms, etc., and also commercial and business messages for purposes of foreign and interstate commerce from and to, into through, and over and between said State of Massachusetts and all the other States and Territories of the United States, the city of Washington, and the District of Columbia, and to and from

foreign countries by ocean submarine cables both for said government and for many private individuals and corporations resident and located as well out of as in said State.

"That it is impossible for said company to determine what portion of any sums received by it was received for services performed in said State in the transmission through the same or any part thereof of messages or communications received or delivered out of it or not on lines over said post roads, streams, or waters, but that the largest part, or approximately seventy per cent., of said sums was for messages received or delivered out of said State.

"That said defendant, on said first day of May, 1885, owned a large amount of real estate located and subject to local taxation out of said State of Massachusetts, on which there was assessed and paid
154 by it a large amount (over $48,000) of taxes, besides other taxes.

"That the amount or value of said real estate was not clearly shown, but it was shown that the cost of land and buildings thereon owned by the defendant and of buildings so owned on land not so owned out of said State was over $3,000,000; and it was agreed by the said parties that if it appeared and became material upon any final decision in this case to fix the amount or value of said real estate, or the taxes thereon, or the amount received for any class of messages, and it was not agreed upon by them, the same should be determined on further hearing by the examiner.

"That no deduction or allowance was made in assessing said tax or in ascertaining the valuation of said franchise for taxation as aforesaid on account of said real estate, land, or buildings, or the taxes paid thereon, or for anything not above specifically stated.

"That notice was duly given to said defendant of said tax, and demand made therefor as required by said chapter, but said defendant protested against said assessment and tax and declined to pay the same; whereupon this information was filed."

The cause was heard on these pleadings and upon the report of the Examiner, and the court on the 28th November, 1887, made a final decree therein:

"That the facts set forth in the examiner's report filed in this cause are true.

"That on those facts the method of valuation, assessment, and taxation provided by the laws of Massachusetts upon the franchise of the defendant corporation is not, as was claimed, and contended by said defendant, illegal and unconstitutional under the con-
155 stitution and laws either of the State of Massachusetts or of the United States—that is to say, either under the Constitution of the United States, Article I, section 8; Article III, section 2; Article VI; Amendments V and XIV; Revised Statutes of the United States, sections 5263, 5264, 5265, 5266, 5267, 5268, 5269, including a revision and consolidation of the act of July 24, 1866, chapter 230, accepted by the defendant before the revision of section 221; or under the constitution of said State, Part I, art. X; Part II, chapter I, section IV; or chapter 13 of its Public Statutes, but was and is in conformity with and authorized by said constitutions and laws, and that

therefore the sum claimed by the plaintiff to be due for taxes, to wit, $10,618.46, be paid to said State by said corporation, with interest thereon, and that an injunction shall be issued out of and under the seal of this court, directed to said corporation and its officers, agents, and servants, commanding them and each of them absolutely to desist and refrain from the further prosecution of the business of said corporation until said sums due to the said Commonwealth as aforesaid for taxes as aforesaid shall have been fully paid, with interest and costs, unless the said sum is paid by said defendant as aforesaid within thirty days from the entry hereof."

From this decree the defendant appealed.

Mr. George S. Hale (with whom were Mr. Charles W. Wells and Mr. Willard Brown on the brief).

I. Telegraph companies, which have accepted the act of Congress, are, as to government business, government agencies, and so far as a state tax on a company is on, or affects, the means employed by the government of the United States to exercise its consti-
156 tutional powers, it is void. Western Union Telegraph Co. *v.* Texas, 105 U. S., 460; Osborn *v.* Bank of the United States, 9 Wheat. 738; Union Pacific Railroad *v.* Peniston, 18 Wall. 5; McCulloch *v.* Maryland, 4 Wheat. 316; Bank of Commerce *v.* New York, 2 Black, 620; Weston *v.* Charleston, 2 Pet. 449, Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S. 1; Mayor *v.* Charleston, 36 Georgia, 460; Wabash, &c., Railway Co. *v.* Illinois, 118 U. S. 557; Fargo *v.* Michigan, 121 U. S. 230; Pickard *v.* Pullman Southern Car Co., 117 U. S. 34; Manufacturers' Ins. Co. *v.* Loud, 99 Mass., 146; Hamilton Manufacturing Co. *v.* Massachusetts, 6 Wall. 632; Provident Institution *v.* Massachusetts, 6 Wall. 611; Portland Bank *v.* Apthorp, 12 Mass. 252; Commonwealth *v.* People's Five Cent Savings Bank, 5 Allen, 428; Bank of Augusta *v.* Earle, 13 Pet. 519; Attorney General *v.* Bay State Mining Co., 99 Mass. 148; Gleason *v.* McKay, 134 Mass., 419; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196; Philadelphia Steamship Co. *v.* Pennsylvania, 122 U. S. 326; People *v.* Weaver, 100 U. S. 539; Robbins *v.* Shelby County Taxing District, 120 U. S. 489.

II. The omission to deduct from the total valuation the real estate located and subject to local taxation in other States, renders the tax excessive and invalid. The Delaware Railroad Tax, 18 Wall. 206; Santa Clara County *v.* Southern Pacific Railroad, 118 U. S. 394; Libby *v.* Burnham, 15 Mass. 144; Stetson *v.* Kempton, 13 Mass. 272.

Mr. Andrew J. Waterman, Attorney General of the Commonwealth of Massachusetts, and Mr. Henry C. Bliss, Assistant Attorney General of that State cited: Portland Bank *v.* Apthorp, 12 Mass. 252; Commonwealth *v.* Savings Bank, 5 Allen, 428; Common-
157 wealth *v.* Hamilton Manuf. Co., 12 Allen, 298, 305, 309; Queen *v.* Arnaud, 9 Q. B. 806, 817; Utica *v.* Churchill, 33 N. Y. 161, 237; Van Allen *v.* Assessors, 3 Wall. 573; Attorney General *v.* Bay State Mining Co., 99 Mass. 148; Bank of Commerce *v.* New York, 2 Black, 620, 630; Delaware Railroad Tax Case, 18 Wall. 206, 225; State Tax on Railway Gross Receipts, 15 Wall. 284, 293;

Wabash, &c., Railroad *v.* Illinois, 118 U. S. 557, 594; Sherlock *v.* Alling, 93 U. S. 99; Munn *v.* Illinois, 94 U. S. 113; Chicago, Burlington, &c., Railroad *v.* Iowa, 94 U. S. 155; Paul *v.* Virginia, 8 Wall. 168; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 209; Railroad Co. *v.* Peniston, 18 Wall. 5, 34; Commonwealth *v.* Lancaster Savings Bank, 123 Mass. 493, 495; Woodruff *v.* Parhams, 8 Wall. 123; Manufacturers' Ins. Co. *v.* Loud, 99 Mass. 146; Oliver *v.* Washington Mills, 11 Allen, 268, 279; Hamilton Co. *v.* Massachusetts, 6 Wall. 632, 639; Dickey *v.* Turnpike Road Co., 7 Dana, 113; Thomson *v.* Pacific Railroad Company, 9 Wall. 579, 590; Fargo *v.* Michigan, 121 U. S. 230; Cooley *v.* Philadelphia, 12 How. 299; *Ex Parte* McNeil, 13 Wall. 236; Osborne *v.* Mobile, 16 Wall. 479, 481; McCulloch *v.* Maryland, 4 Wheat. 316, 429; Dwight *v.* Boston, 12 Allen, 316; S. C. 90 Am. Dec. 149; Railroad Company *v.* Fuller, 17 Wall. 560, 568.

Mr. Justice MILLER delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Massachusetts.

The action was commenced in the Supreme Judicial Court of Massachusetts, sitting in equity, by an information on behalf of the Commonwealth, by its Attorney General, at the relation of the Treasurer thereof, Alanson W. Beard. It was afterwards removed,
158 upon motion of the defendant, the Western Union Telegraph Company, into the Circuit Court of the United States. The object of the information was to enforce the collection of a tax levied by the proper authorities of the State upon the telegraph company, and to enjoin it from the further operation of its telegraph lines within the territorial limits of the Commonwealth until that tax was paid.

The defendant company is a corporation organized under the laws of the State of New York, having its capital stock divided into shares. The tax assessed by the treasurer of the Commonwealth of Massachusetts was based upon an estimate of $750,952 as the taxable value of the shares of the corporation apportioned to that State, the rate of taxation having been determined for that year, 1885, at $14.14 for and upon each $1,000 of valuation. The mode by which this taxable valuation was arrived at was this: The treasurer ascertained from the officers of the telegraph company that the valuation of its entire capital stock was $17,500,000, from which were deducted the credits proper to be allowed in determining the assessable value, leaving $38,713,924 as the total valuation of said stock liable to taxation. It was then ascertained that the total number of miles of line of said corporation in all the States and Territories of this country was 146,052.60, of which 143,219.55 were without the limits of the Commonwealth of Massachusetts, leaving 2,833.05 miles within its boundaries. Taking these figures the Treasurer of the State assessed the value of that portion of the capital stock of this company which, under this calculation, would fall within the Commonwealth of Massachusetts at the sum of $750,952. The amount thus arrived at, at the rate of $14.14 upon each $1,000 of valuation, produced the

sum of $10,618.46 as the amount of the tax claimed to be
159 due and payable to the treasurer of said Commonwealth by that corporation. This sum was demanded of the telegraph company, but it refused to pay the same.

The answer of the defendant corporation set up that of its 2,833.05 miles of line within the State of Massachusetts more than 2,334.55 miles were over, under, or across post-roads, made such by the United States, leaving only 498.50 miles not over or along such post-roads, on which the company offered to pay the proportion of the tax assessed according to mileage by the state authorities.

The main ground on which the telegraph company resisted the payment of the tax alleged to be due, and on which probably the case was removed from the state court into the Circuit Court of the United States, is that it is a violation of the rights conferred on the company by the act of July 24, 1866, now Title LXV, §§ 5263 to 5269 of the Revised Statutes. The defendant alleges that it had accepted the provisions of that law, and filed a notification of such acceptance with the Postmaster General of the United States, June 8, 1867. The argument is, therefore, that by virtue of sec. 5263 the company has a right to exercise its functions of telegraphing over so much of its lines as is connected with the military and post-roads of the United States which have been declared to be such by law without being subject to taxation therefor by the state authorities. That section reads as follows:

"SEC. 5263. Any telegraph company now organized, or which may hereafter be organized under the laws of any State, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the
160 United States which have been or may hereafter be declared such by law, and over, under, or across, the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post-roads."

It is urged that this section, upon its acceptance by this corporation or any of like character, confers a right to do the business of telegraphing which is transacted over the lines so constructed over or along such post-roads, without liability to taxation by the State. The argument is very much pressed that it is a tax upon the franchise of the company, which franchise being derived from the United States by virtue of the statute above recited cannot be taxed by a State, and counsel for appellant occasionally speak of the tax authorized by the law of Massachusetts upon this as well as all other corporations doing business within its territory, whether organized under its laws or not, as a tax upon their franchises. But by whatever name it may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the corporation. The laws of that Commonwealth attempt to ascertain the just amount which any corporation engaged in business within its limits shall pay

as a contribution to the support of its government upon the amount and value of the capital so employed by it therein.

The telegraph company, which is the defendant here, derived its franchise to be a corporation and to exercise the function of telegraphing from the State of New York. It owes its existence, its capacity to contract, its right to sue and be sued, and to exercise the business of telegraphy, to the laws of the State under which it is organized. But the privilege of running the lines of its wires
161 "through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States, * * * and over, under, or across the navigable streams or waters of the United States," is granted to it by the act of Congress. This, however, is merely a permissive statute, and there is no expression in it which implies that this permission to extend its lines along roads not built or owned by the United States, or over and under navigable streams, or over bridges not built or owned by the Federal government, carries with it any exemption from the ordinary burdens of taxation.

While the State could not interfere by any specific statute to prevent a corporation from placing its lines along these post-roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the State for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person would be. It never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support.

In the case of Telegraph Co. *v.* Texas, 105 U. S. 460, this question was very fully considered, and while a tax imposed upon every telegram passing over its lines, whether entirely within the State or coming from without its limits, or going from the State out of it, was held to be void so far as related to messages passing through more than one State, as an interference with or regulation
162 of commerce and with the act of Congress we have just been considering, it was distinctly pointed out that if it could be ascertained what telegrams were confined wholly within the State a tax on those might be imposed by it.

In that case the Chief Justice, delivering the opinion of the court, said:

"The Western Union Telegraph Company having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a government agent for the transmission of messages on public business. Its property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business. The precise question now presented is whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out

of the State, or sent by public officers on the business of the United States." pp. 464, 465.

This authority of the government gives to this telegraph company, as well as to all others of a similar character who accept its provisions, the right to run their lines over the roads and bridges which have been declared to be post-roads of the United States. If the principle now contended for be sound every railroad in the country should be exempt from taxation because they have all been declared to be post-roads and the same reasoning would apply with equal force to every bridge and navigable stream throughout the land. And if they were not exempt from the burden of taxation simply because they were post-roads, they would be so relieved whenever a telegraph company chose to make use of one of these roads or bridges along or over which to run its lines. It was to provide against the recognition of such a principle that this court, in the case above cited,
163 while holding that telegrams themselves coming from without a State or sent out of it as a part of their conveyance could not be taxed by the State specifically, nevertheless used the language that "its property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business."

A still stronger case in the same direction is that of Railroad Company *v.* Peniston, 18 Wall. 5. The plaintiff in that action, the Union Pacific Railroad Company, was incorporated under a law of the United States. The State of Nebraska, under a revenue law passed by its legislature, undertook to lay a tax upon the property of that company which was used or embraced within the limits of its territory, upon a valuation of $16,000 per mile. The property thus rated and taxed consisted of its road beds, depots, stations, *telegraph poles, wires,* bridges, etc. It will be here observed that a part of the valuation on which this tax was levied was made up of the telegraph poles and wires belonging to the company.

The argument was pressed in that case that the railroad company held its franchises from the government of the United States, and that its property could not be taxed by the State, but this court held otherwise, and in the opinion used this language:

"It is often a difficult question whether a tax imposed by a State does in fact invade the domain of the general government, or interfere with its operations to such an extent, or in such a manner, as to render it unwarranted. It cannot be that a State tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the Constitution. To hold that
164 would be to deny to the States all power to tax persons or property. Every tax levied by a State withdraws from the reach of Federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which Federal taxes may be laid. The States are, and they must ever be, co-existent with the national government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be ex-

tended so far as to destroy the necessary powers of the States, or prevent their efficient exercise" pp. 30, 31.

In the case of Thomson *v.* Pacific Railroad Co., 9 Wall. 579, is then cited, where it was held that the property of that company was not exempt from state taxation, though their railroad was a part of a system of roads constructed under the authority and direction of the United States, and largely for the uses and to serve the purposes of the general government. The court further said:

"A very large proportion of the property within the States is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. United States mails, troops and munitions of war are carried upon almost every railroad. *Telegraph lines* are employed in the national service. So are steamboats, horses, stage coaches, foundries, ship yards and multitudes of manufcaturing establishments. They are the property of natural persons or of corporations, who are agents or instruments of the general government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to
165 the revenue of the States it is manifest the state governments would be paralyzed. While it is of the utmost importance that all the powers vested by the Constitution of the Untied States in the general government should be preserved in full efficiency, and while recent events have called for the most unembarrased exercise of many of those powers, it has never been decided that state taxation of such property is impliedly prohibited." p. 33.

In National Bank *v.* Commonwealth, 9 Wall. 353, which was a case of a tax levied upon the shares of a national bank, the same objection in regard to a tax by state authority was pressed upon the court, but this court said that the principle of exemption of Federal agencies from state taxation has a limitation growing out of the necessity upon which the principle is founded. "That limitation is, that the agencies of the Federal government are only exempted from state legislation, so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers into an unauthorized and unjustifiable invasion of the rights of the States. * * * So of the banks. They are subject to the laws of the State and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State law. Their acquisition and transfer of property, their right to collect their debts and their liability to be sued for debts are all based on State laws. It is only when the State law incapacitates the banks from discharging
166 their duties to the government that it becomes unconstitutional. We do not see the remotest probability of this in their being required to pay the tax which their stockholders owe to the State for the shares of their capital stock, when the law of the Federal government authorized the tax." p. 362.

The tax in the present case, though nominally upon the shares of the capital stock of the company, is in fact a tax upon that organization on account of property owned and used by it in the State of Massachusetts, and the proportion of the length of its lines in that State to their entire length throughout the whole country is made the basis for ascertaining the value of that property. We do not think that such a tax is forbidden by the acceptance on the part of the telegraph company of the rights conferred by sec. 5263 of the Revised Statutes, or by the Commerce clause of the Constitution.

It is urged against this tax that in ascertaining the value of the stock no deduction is made on account of the value of real estate and machinery situated and subject to local taxation outside of the Commonwealth of Massachusetts. The report of Examiner Fiske to whom the matter was referred to find the facts, states that the amount of the value of said real estate outside of its jurisdiction was not clearly shown, but it did appear that the cost of land and buildings belonging to the company and entirely without that State was over three millions of dollars. In the statement of the treasurer of the company it is said that the value of real estate owned by the company within the State of Massachusetts was nothing. Since the corporation was only taxed for that proportion of its shares of capital stock which was supposed to be taxable in that State on the calculation above referred to, and since no real estate of the corporation was
167 owned or taxed within its limits, we do not see why any deduction should be made from the proportion of the capital stock which is taxed by its authorities. But if this were otherwise we do not feel called upon to defend all the items and rules by which they arrived at the taxable value on which its ratio of percentage of taxation should be assessed and even in this case, which comes from the Circuit Court, and not from that of the State, we think it should appear that the corporation is injured by some principle or rule of the law not equally applicable to other objects of taxation of like character. Since, therefore, this statute of Massachusetts is intended to govern the taxation of all corporations therein, and doing business within its territory, whether organized under its own laws or those of some other State, and since the principle is one which we cannot pronounce to be an unfair or an unjust one, we do not feel called upon to hold the tax void, because we might have adopted a different system had we been called upon to accomplish the same result.

It is very clear to us when we consider the limited territorial extent of Massachusetts, and the proportion of the length of the lines of this company in that State to its business done therein, with its great population and business activity, that the rule adopted to ascertain the amount of the value of the capital engaged in that business within its boundaries, on which the tax should be assessed, is not unfavorable to the corporation, so that the details of the method by which this was determined have not exceeded the fair range of legislative discretion. We do not think that it follows necessarily, or as a fair argument from the facts stated in the case, that there was injustice in the assessment for taxation.

168 The result of these views is that the tax assessed against the plaintiff in error is a valid tax; that the judgment of the court below, "That the sum claimed by the plaintiff (below) to be due for taxes, to wit, $10,618.46, be paid to said State by said corporation, with interest thereon," is without error, and so much of said judgment is hereby affirmed.

The decree or judgment, however, proceeds and awards an injunction against the company in the following language, added to that above extracted; "and that an injunction shall be issued out of and under the seal of this court, directed to said corporation and its officers, agents, and servants, commanding them, and each of them, absolutely to desist and refrain from the further prosecution of the business of said corporation until said sums due to the said Commonwealth for taxes, as aforesaid, shall have been fully paid, with interest and costs, unless the said sum is paid by said defendant within thirty days from the entry hereof."

The effect of this injunction, if obeyed, is to utterly suspend the business of the telegraph company and defeat all its operations within the State of Massachusetts. The act of Congress says that the company accepting its provisions "shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States." It is found in this case that 2334.55 miles of the company's lines, out of 2833.05, on which this tax is assessed, are along and over such post-roads, and, of course, the injunction prohibits the operation of the defendant's telegraph over these lines, nearly all it has in the State.

169 If the Congress of the United States had authority to say that the company might construct and operate its telegraph over these lines, as we have repeatedly held it had, the State can have no authority to say it shall not be done. The injunction in this case, though ordered by a Circuit Court of the United States, is only granted by virtue of section 54 of chapter 13 of the Public Statutes of Massachusetts. If this statute is void, as we think it is, so far as it prescribes this injunction as a remedy to enforce the collection of its taxes by the decrees of the court awarding it, the injunction is erroneous.

In holding this portion of section 54 of chapter 13 of the Massachusetts statutes to be void as applicable to this case, we do not deprive the State of the power to assess and collect the tax. If a resort to a judicial proceeding to collect it is deemed expedient, there remains to the court all the ordinary means of enforcing its judgment —executions, sequestration, and any other appropriate remedy in chancery.

That part of the decree of the Circuit Court which awards the injunction is, therefore, reversed, and the case is remanded to that court for further proceedings in conformity to this opinion.

Mr. Justice Bradley was not present at the argument of this case and took no part in its decision.

170 "EXHIBIT D" FOR IDENTIFICATION.

LAWS OF NEW JERSEY FOR THE TAXATION OF RAILROAD AND CANAL PROPERTY. GENERAL PUBLIC LAWS OF 1888, PAGES 269-287.

CHAPTER CCVIII.

"An Act to Revise and Amend 'An Act for the Taxation of Railroad and Canal Property,' Approved April Tenth, One Thousand Eight Hundred and Eighty-four.

1. *Be it enacted by the Senate and General Assembly of the State of New Jersey,* That all the property of any railroad or canal company not used for railroad or canal purposes shall be assessed and taxed by the same assessors and in the same manner and at the same rate as the taxable property of other owners in the same municipal division or taxing district; all other property of any railroad or canal company shall be assessed and taxed as hereinafter directed; the tax imposed by this act shall be in lieu of all other taxation upon the property subject to taxation under the provisions of this act; in all cases where the real estate, tangible personal property and franchise of any company are assessed and taxed under this act, the shares of stock and the bonds and certificates of indebtedness of such company shall not be taxed in the hands of the shareholders, bondholders or creditors, except as hereinafter provided.

2. (Amended by General Public Laws of 1891, Chapter 98, Page 165.)

3. *And be it enacted,* That it shall be the duty of the board of assessors to meet at Trenton on the first Tuesday of May in the present and each succeeding year and as often during each year and
171 at such places as their duties may require; they shall proceed to ascertain the true value of all property used for railroad or canal purposes of each railroad and of each canal company in this state, including its franchises, and they shall, in such ascertainment, ascertain:

I. The length and value of the main stem of each railroad, and of the water-way of each canal and the length of such main stem and water-way in each taxing district;

II. The value of the other real estate used for railroad or canal purposes in each taxing district in this state, including the road-bed (other than main stem), water-ways, reservoirs, tracks, buildings, water-tanks, water-works, riparian rights, docks, wharves and piers, and all other real estate, except lands not used for railroad or canal purposes;

III. The value of all the tangible personal property of each railroad and each canal company;

IV. The value of the remaining property, including the franchise.

The term 'main stem' of each railroad and of each canal company, as used in this act, shall be held to include the road-bed not exceeding

one hundred feet in width, with its rails and sleepers, depot buildings used for passengers connected therewith; the term 'water-way' shall be held to include the towing-path and berme-bank; the term 'taxing district' shall be held to designate any municipality, city, township, borough, incorporated town or village having power to assess and levy taxes, through which any road or canal may run; the term 'tangible personal property' shall be held to include the rolling-stock, cars, locomotives, ferryboats, all machinery, tools, other tangible per-
172 sonal property of any railroad company, and the floating, movable and other tangible personal property of any canal company, and also the locomotives and cars not belonging to such railroad company but built for its use and actually used in this state, or run under its control in this state by a sleeping-car company or other company; but the rolling stock of other persons or corporations temporarily used on any such road, and the floating or movable property temporarily used on such canal, but not forming part of the equipment of such road or canal, shall not be included in said term.

4. *And be it enacted,* That it shall be the duty of the assessors in all taxing districts where property of any railroad or canal company not used for railroad or canal purposes shall be assessed, if required so to do by the state board of assessors, to certify and send to the state board of assessors, on or before the second Monday of June in each year, a statement giving the description of such property and showing the assessed valuation thereof; the local assessors shall also, at the same time, certify and send to the state board of assessors a short description of all the real property in their respective taxing districts, used or owned for railroad or canal purposes, excepting the main stem or road-bed and track, not exceeding one hundred feet in width of each railroad, and the water-way, towing-path and berme-bank, not exceeding one hundred feet in width of each canal; the said assessors shall also certify to the said board the local rate of taxation for county and municipal purposes, as soon as the same shall be determined, and such other information obtained in the course of the performance of the duties of their office as the said board shall re-
173 quire of them, and for the service mentioned in this section the said local assessors shall receive three dollars per day for each day actually engaged in such service, to be paid on the warrant of the comptroller, on an affidavit of such service being filed in the office of said comptroller.

5. *And be it enacted,* That on the first Monday of July the board shall meet at the state house, in Trenton, and shall give a hearing to all companies interested, touching the valuation and assessment of their property; the board may adjourn from day to day, and may, if they see fit, require all arguments and communications to be presented in writing; when the first Monday of July shall fall on the fourth of fifth day of that month, the day of meeting shall be on the first Tuesday of July; all parties interested shall take notice of this hearing.

6. *And be it enacted,* That if the property of any railroad or canal company be leased to or operated by any other corporation, foreign

or domestic, the property of the lessor, or company whose property is operated, shall be subject to taxation in the manner hereinbefore directed, and if the lessee or operating company, being a foreign corporation, be the owner or possessor of any property in this state other than that which it derives from the lessor or company whose property is operated, it shall be assessed in respect of such property in like manner as any domestic railroad or canal company; any tangible personal property of such foreign company, if used or kept but a part of the time in this state, shall be assessed such proportionate part of its value as the time it is used or kept in this state during the calendar year preceding bears to the whole year.

7. *And be it enacted,* That in case any railroad or canal company shall claim any deduction on account of any mortgage or debt secured thereby, the said board are hereby required to allow the same in the cases in which and to the extent to which the assessor is authorized by law to allow a deduction in the case of any other owner of mortgaged lands, and thereupon the said mortgage and the estate of the mortgagee in the land mortgaged shall be subject to taxation in the same manner, as nearly as may be, and at the same rate or rates, as the estate of the mortgagor; the deduction shall be made *pro rata* from the valuation of each class of property covered by the mortgage, and the amount received from the taxation thereof shall be distributed as if the tax had been paid by the mortgagor without deduction.

8. *And be it enacted,* That if any railroad or canal company shall claim a deduction in any case in which such deduction could be claimed under the general laws of the state by other taxpayers for debts other than the deduction last hereinbefore mentioned, the said board are hereby required to allow the same and the said indebtedness so allowed shall be taxable as other debts owing to creditors residing in this state are taxable, and at the same rate; but the assessment thereof shall be made by said board and not by the local assessor, and the tax shall be paid to the treasurer of the state, to the credit of the fund derived from taxation under this act; the deduction shall be made *pro rata* from the valuation of each class of property of the debtor assessed, and shall be distributed as if the tax had been paid by the debtor without deduction; *provided,* that no deduction, either for mortgage or other indebtedness, shall be allowed unless the same shall be applied for in the report and statement required to be made pursuant to this act, and unless the nature of the indebtedness, and the name and residence of the creditor, and the different taxing districts in which the mortgaged land lies, shall be specified, and unless the other terms imposed by the general laws of the state upon other taxpayers claiming deduction shall be complied with.

9. *And be it enacted,* That the state board of assessors shall, upon the completion of their valuation and assessment, proceed to compute the tax upon the entire assessed valuation of each railroad company and of each canal company, as ascertained by them; upon such valuation, each company shall pay to the state, for general state purposes, a tax at the rate of one-half of one per centum an-

nually upon each dollar of valuation, and the state board of assessors shall compute the same; each company shall also pay, in addition to said tax of one-half of one per centum, a tax at the local rate as fixed and assessed for county and municipal purposes upon other property in each taxing district, upon the valuation of its property in the several taxing districts, separately valued and assessed under the provisions of subdivision two of section three of this act, which tax shall also be computed by the state board of assessors; but the last-mentioned rate shall in no case exceed one per centum of the valuation of the property valued under the provisions of subdivision two of section three of this act; the sum of the estimates or computations for each company shall constitute the tax to be paid by each company and shall be a lien paramount to all other liens upon all the lands and tangible property and franchise of such company in this state; such lien shall take effect on the first day of November, and a copy of the valuation in detail of the property of each cor-
176 poration and of the tax assessed against the same under the provisions of this act shall be served upon the treasurer of such corporation or left at his office within ten days after the said first day of November, but the failure to serve any such notice shall not be held to invalidate any tax assessed or affect any lien created under this act; said tax shall be a debt due from such company to the state on that date, for which an action at law or in equity may be maintained and which shall be a preferred debt in case of insolvency; these remedies are in addition to the special proceedings provided for in this act.

10. *And be it enacted*, That the said board shall certify and report to the comptroller of the state, on or before the first day of December in each year, a statement of the assessed valuation of the property of each company in the state, and of the separate valuation of property in each taxing district, as made by them, the amount of tax payable by such company with respect to its property separately valued in each taxing district, and the aggregate assessed valuation, and the total tax levied upon each company; such statement shall be made separately for each company, and as to said property separately valued, shall be arranged by taxing districts in such manner as to be of easy reference, and shall be recorded in books in the office of the state comptroller, to be provided by him for that purpose, and shall be public records, subject to public inspection; and the amount of tax payable by each company, as shown by the said statements, shall be due and payable into the state treasury, on any day between the first day of November and the first day of February following: and the payment or collection thereof shall not be stayed by any writ or order of any court of law or equity; it
177 shall be the duty of the state treasurer to receive payment of the said taxes from the said companies; if the taxes of any company, or any portion thereof, remain unpaid on the first day of February following the levying thereof, such company shall be considered in default, and such taxes, or such unpaid portion thereof, shall thenceforth bear interest at the rate of one per centum for each month until paid, notwithstanding the prosecution of any

writ of certiorari or other remedy; *provided,* that so much of the tax as is applicable to general state uses, as hereinafter provided, may be paid in four equal installments on or before the first day of February, May and August and the fifteenth day of October in each year, and any unpaid portion or installment shall bear interest only from the date limited for the payment thereof, at one per centum for each month until paid, but this privilege of payment by installments shall not be granted unless the portion of the tax which is applicable to county and local purposes shall be paid before the first day of February following the levying thereof.

11. (Amended by General Public Laws of 1888, Chapter 259, Pages 376, 377.)

12. *And be it enacted,* That the said state board of assessors shall meet on the third Monday of November, at the state house, in Trenton, for the purpose of reviewing their assessment, and may adjourn from time to time until they shall have finished the hearing; upon the written complaint of any company or person considering itself or himself aggrieved, and specifying their grievance, or of the attorney general or of any member of the board, on behalf of the state, that the property of any company is assessed too low, either in the whole or in any taxing district, or that property has been omitted, they shall review the said assessment, and
178 correct the same as shall appear just; the attorney general shall attend such meeting of said board in person or by deputy; no complaint that any company or person is assessed too low, or that any property has been omitted, shall be acted upon until the company or person so assessed shall be notified of such complaint by five days' notice, to be served on such company or person by leaving the same at the office of such company or at the usual place of abode of such person, if a resident of this state; the board shall have the power to issue subpœnas and examine witnesses and call for the production of books and papers, and they shall be entitled to use their personal knowledge and judgment as to the value of property; they shall certify to the comptroller of the state all corrections which they shall make in any assessment; the proceedings provided for by this section shall be completed before the fifteenth day of January following the making of said assessment, and all complaints must be presented on or before the third Monday of November, or shall be deemed to have been waived.

13. *And be it enacted,* That if any company or person assessed, or if the attorney general on behalf of the state, or if the authorities of any taxing district, shall desire to contest the validity or amount of any tax levied upon property under the provisions of this act, such contest shall be made by certiorari, which may be granted on notice to the attorney-general or to the company or person assessed, on a proper case made, on such terms as the justice or court granting the writ may impose; upon such writ, relief may be had as well in cases where it is claimed that the amount of tax is excessive or insufficient, as in cases where it is claimed that the principle
179 upon which the assessment is made is erroneous; *provided,* that no writ of certiorari shall be granted unless the appli-

cant has applied to said board of assessors to review the assessment, as provided for in this act, nor shall any writ of certiorari be granted after the expiration of three months from the final determination of said board; if such writ shall be allowed, and if it shall be made to appear that any assessment is unlawful, excessive or insufficient, the court shall correct the same by whomsoever such writ shall be prosecuted, and reduce or increase it, as may be just, or refer it back to the board of assessors, who shall correct or re-assess the same, in accordance with the instructions of the court; in any suit or proceeding, except on such certiorari, the certificate and report of the state board of assessors shall be conclusive and shall have the force and effect of a judgment of a court of record having competent jurisdiction, and the proceedings whereon such certificate and report are founded, shall not be inquired into; no assessment or tax shall be set aside for misnomer of the owner of the property assessed; but the name may be corrected at any time by the board of assessors or court; the prosecutor of a writ of certiorari shall pay eight cents per folio to the state board of assessors and comptroller for returns made by them of proceedings under this act.

14. *And be it enacted,* That if any tax under the provisions of this act shall remain unpaid in whole or in part for ten days after the expiration of the time limited for payment thereof, it shall be the duty of the attorney general to apply forthwith to a justice of the supreme court for an order that said tax and the interest due thereon and a reasonable sum to be certified by said justice to be paid for the expense of said proceeding, shall be made a record of the supreme court, and judgment shall be entered therefor in the name of the State of New Jersey as plaintiff against said company, mortgagee or mortgagees, or other creditor, as defendant, which order shall be made upon the production of a certified copy from the comptroller of the certificate and report of the state board of assessors on file in his office, and of the certificate of the comptroller that said tax has not been paid; the attorney general shall also apply for an order that execution forthwith issue on said judgment, directed to a master of the court of chancery, to be named by said justice in said order; the said orders shall be respectively applied for on five days' notice to the company or mortgagee or mortgagees or other creditor concerned, which notice, in case of any company, shall be served in the same manner as a summons is directed by law to be served upon a corporation, and in all cases the proceedings shall be summary; in case a certiorari shall have been granted, on application of the attorney-general the orders above provided for shall be made and enforced without prejudice to the right of the state to enforce the payment of any additional amount of tax which may be imposed and to apply for a second judgment therefor; in case a certiorari shall have been granted on application of any company or mortgagees or other creditor taxed, and the tax shall have been reduced after the payment thereof, then the excess shall be repaid by the state upon the order of the court, and the state comptroller shall, upon such order, issue his warrant for such payment accordingly.

15. *And be it enacted*, That the master in chancery to whom the execution shall be directed shall sell all the franchise, real estate and rolling stock and property of said company, and the
181 estate and interest of any mortgagees, and the debt due to any creditor for which a deduction has been allowed, or so much thereof as may be necessary to make the amount due on said tax judgment and the usual execution fees; the execution shall describe the property or debt aforesaid whereon the tax was assessed, and shall direct the sale thereof, and, generally, the sale of all other property of said company or person; such sale shall pass the absolute title to the franchise and property and debt aforesaid so sold, whereon the said tax was assessed or became a lien, free and clear of all liens, incumbrances and trusts of every nature, except taxes subsequently levied; in case of the sale of the estate and interest of any mortgagee it shall pass as well such estate as the interest of all bondholders and *cestuis que trust* for whose benefit said mortgage may have been given or may be held in trust or otherwise as to any other property of said company or persons, the judgment and execution shall constitute or become liens in the same manner and to the same extent as other judgments and executions of the supreme court; the sale, advertisements and proceedings under such executions shall be the same as under other executions of the supreme court; *provided, however*, that the company whose franchise, real estate, rolling stock and property, or any part thereof, has been so sold, and the mortgagee or mortgagees or any bondholder or other person having an interest in the estate and interest of the corporation or mortgagee which has been so sold, may, at any time within two years from and after any such sale, redeem the property so sold by tendering and paying to the purchaser or purchasers thereof the amount of the purchase-money by him or them paid, together with interest thereon at the rate of ten per centum per annum.

182 16. *And be it enacted*, That in order to ascertain the facts necessary for the discharge of their duties under this act, the said board shall use such lawful means as they may deem necessary; they may employ surveyors if they shall be dissatisfied with information otherwise attainable; they shall have the power of compelling the attendance of witnesses and the production of books and papers; and they may delegate such power to any member of their board authorized by them to investigate and report; they shall also use the returns hereinafter provided for, but such returns shall not be conclusive, and if any of said returns shall not be made, the board shall ascertain the necessary facts from the best information they can obtain, in such mode as they may find convenient, using their personal knowledge and judgment; the said assessors, or any one of them, shall have power to administer oaths and affirmations to any person to ascertain any facts which will enable them properly to perform the duties of their office, and they may reduce the statements of the person sworn to writing, and require him to swear and subscribe thereto, and may *ex parte*, apply for and obtain from any justice of the supreme court an order to compel any person to submit to examination in reference to such matters, and such justice

may punish any party as for a contempt who shall disobey any order made by such justice in the premises.

17. *And be it enacted*, That on or before the first Tuesday of May in each year, any person or company running, operating or constructing any railroad or canal in this state shall return to the state board of assessors statements or schedules, subscribed and sworn to by the president or other chief officer, before some officer
183 of the state authorized to administer oaths, of the property of such railroad or canal as it existed on the first day of January preceding, which, for each railroad, shall be as follows:

I. Of the real estate, specifying its extent and dimensions, which may be shown by a map or maps, setting out in detail the total length of the road, including branch and leased lines, the entire length in this state, and the length of double or side tracks; and the number, character and value of all buildings and structures in each county and in each taxing district through or in which it is located in this state, designating the main stem or road-bed and the width wherever it exceeds one hundred feet, and designating particularly any portion in each taxing district which is not used for railroad purposes, and which is locally assessed and taxed, and the value thereof;

II. Of the rolling stock and tangible personal property, giving the number of freight engines, passenger engines, passenger and freight cars, ferry boats and other movable property of every description, owned, used or hired, and the value thereof;

III. A statement or schedule, showing:

a. The amount of capital stock authorized and the number of shares into which such capital stock is divided:

b. The amount of capital stock paid up;

c. The market value, and if no market value, then the actual value of the shares of stock;

d. The total amount and the details and particulars of all indebtedness;

Such statements and schedules for canals shall be as follows:

I. Of all the real estate of said company, giving the depth
184 of water and dimensions of such canal, the length of the canal and of its feeders in the state, and the number, character and value of all locks, and of all buildings and other structures in each county and taxing district, designating particularly the width where it exceeds one hundred feet and designating any portion in each taxing district which is not used for canal purposes and which is locally assessed and taxed;

II. The floating and movable property;

III. A statement or schedule containing all the particulars above enumerated and to be returned by railroad companies in the third statement or schedule; such statements or schedules shall be made in conformity with such instructions and forms as may be prescribed by the said board, and such further statements shall be furnished as said board shall require; the said board shall prescribe the form of the oath to the statements and schedules required by

this section, any person who shall make such oath falsely shall be guilty of perjury.

18. *And be it enacted*, That any railroad or canal company claiming exemption from taxation under this act, by reason of any alleged contract with the state, shall, together with and in addition to the return required by the last section, make a further return specifying the act or acts of the legislature by which such contract is claimed to have been created, and also specifying what portion of the property of said railroad or canal company is claimed to be exempt from taxation under this act and the particulars thereof, and the cost and value thereof; and such other particulars as the charter of said company and as the said board may require, and the particulars as to character, location and value of the
185 property, if any, admitted to be liable under this act; such return shall be in no manner conclusive as to any of the facts therein stated, but said board shall investigate and determine whether any, and if any, what portion of the property of such company is by contract beyond the power of the state to tax under this act; and shall ascertain the cost and value thereof, and shall estimate the tax to be paid by such company; the residue of said property shall be assessed, apportioned, and valued and taxed pursuant to the provisions of this act.

19. *And be it enacted*, That it shall not be lawful for any railroad or canal company having any contract with the state whereby any of their property is exempted from the taxation imposed by this act, to acquire and hold, directly or indirectly, any property in this state (except such property as such company may be entitled to acquire and hold pursuant to their said contract with this state, if such company has any charter provisions on this subject which the legislature cannot abrogate or repeal), unless such company shall, by a written instrument, executed under their common seal, approved by the attorney general and filed with the secretary of state, first agree that any and all property acquired by such company after the passage of this act shall be subject to taxation under the provisions of this act, or any amendments thereto, or any further act of the legislature, in which case such property shall be so subject.

20. *And be it enacted*, That if any person or corporation running, operating or constructing any railroad or canal shall wilfully neglect to make returns, as required by this act, such person or corporation shall forfeit as a penalty not more than ten thousand dollars, to be assessed by the jury, for each offence, to be recovered in any
186 proper form of action in the supreme court, in the name of the state, and paid into the state treasury; it shall be the duty of said board to certify any such default to the attorney-general of the state, and it shall be the duty of the attorney-general to prosecute for such penalty; any person who shall make falsely any oath required to be made under this act, and any person who shall testify falsely when called to testify under this act, shall be guilty of perjury, and on conviction thereof shall be liable to all the penalties prescribed by law therefor.

21. *And be it enacted*, That all railroad companies in this

state, which shall hereafter pay any taxes imposed by this act on any cars, hired, leased, run or used on the roads of such companies in this state, shall have a right of action against the company or persons owning such cars, for the taxes so paid, with interest thereon from date of payment, and may sue for and recover the same in any court of competent jurisdiction; but nothing in this section shall be so construed as to avoid the obligation of any contract relating to the payment of taxes heretofore entered into or made between any such company, its agents, or person owning such cars, and any such railroad company.

22. *And be it enacted,* That if any company shall be in default under this act in payment of the state tax aforesaid, any person having any interest in a mortgage or other lien on its franchises or property, may pay the state treasurer the amount of such state tax, and the interest due thereon, and receive from said treasurer a certificate of such payment, and such person shall thereupon be entitled to be repaid the amount of said tax and interest thereon at
187 the rate of twelve per centum per annum out of the first proceeds of any sale of the franchises or said property of said company, and such tax and interest thereon shall continue a lien on the franchise and property of the company for the benefit of the holder of or person interested in such mortgage or lien until paid by said company from the sale of its franchises or property; if any proceedings have been taken by the attorney-general to enforce the payment of said tax and interest thereon, then such holder of or person interested in a mortgage or lien paying such tax and interest shall pay such additional amount as a justice of the supreme court shall certify to be proper and reasonable for the expenses and services of the proceedings as far as they have progressed for the collection of said tax and interest thereon.

23. *And be it enacted,* That if any railroad or canal shall be owned or operated under a franchise by any individual or association not incorporated, the term 'company' used in this act shall apply to such owners or operators, and such property shall be assessed and taxed under the provisions of this act in the same manner as if operated by a company, and the persons operating or owning such railroad or canal shall make the returns required by this act to be made by companies.

24. *And be it enacted,* That the Attorney-General shall, with the approval of the governor and comptroller, have power to employ such assistant attorneys or counsel as may be necessary to protect and properly defend the interest of the state, in carrying out the provisions of this act; and such assistants shall be paid such compensation by the state as may be approved by the attorney-general and the comptroller; the state board of assessors shall have the
188 power to employ such assistants in making their valuations as may be necessary to complete the same in due time, and such assistants shall be paid such reasonable compensation for their services as the board and the governor shall approve.

25. *And be it enacted,* That any corporation having or claiming to have any contract with the state whereby any of its property is

claimed to be exempted from the taxation imposed by this act, may, at its discretion, voluntarily pay to the state from year to year such sums of money as, added to the tax now assessable against such corporation under such alleged contract, will be equal to the tax assessable against such corporation under this act in respect to the property so claimed to be exempted, and such voluntary payment shall not be construed in any proceeding or suit to be a waiver by such corporation of its said alleged contract; *provided, however,* that nothing in this section, or in this act contained shall be construed or taken as an admission on the part of the state that any corporation is possessed of any contract or especial provision of the law on the subject of taxation which may not at any time be repealed or modified by the state.

26. *And be it enacted,* That if any section of this act shall, for any reason, be held to be unconstitutional or invalid, it shall not affect the other provisions of this act or any of them.

27. *And be it enacted,* That any corporation in this state having the right, by contract, to any different imposition of tax, either state or municipal, than that provided for in this act, are hereby authorized to execute and file in the office of the secretary of state an instrument, to be first approved by the attorney general, waiving the benefit of any such contract, whereupon they shall be
189 bound by the terms of this act, or any amendments hereto, or any further act of the legislature, and upon filing any such instrument the state agrees to surrender its right to take the property of any such corporation under any law now existing; *provided,* that any such corporation shall execute and file such instrument within six months from the time of the passage of this act.

28. *And be it enacted,* That in case any property of any railroad or canal company which has been or shall hereafter be in any year assessed by the local authorities of any taxing district has been or shall be also assessed by the state board of assessors as property used for railroad or canal purposes, the supreme court or any three justices thereof, to be assigned by the chief justice, shall determine, in a summary manner, the character of the property and whether used for railroad or canal purposes, and by which assessors the same has lawfully been assessed, which determination shall be made whether the taxes in question have been paid or not, and whether a certiorari to review either assessment has been granted or not; such determination shall be made under an order to show cause at a time and place to be therein designated, which order shall be granted by the chief justice of the supreme court upon application *ex parte* by any of the parties interested, namely, by the attorney general on behalf of the state, or by the owner of the property assessed, or by the authorities of the taxing district; and said order shall be served not less than ten days before the day fixed therein for the hearing, upon the said parties interested not making such application; depositions may be taken, on two days' notice by either party, to be used on such hearing; the justices before whom the matter shall be heard, may, if they see fit, view
190 the property in dispute, to guide them in their decision; the judgment of the court shall direct the cancellation or reduc-

tion of either assessment, as the character of the property may require, and shall make such order as to the return to the taxpayer of any tax or any portion thereof, that may have been paid to the state, or to any taxing district not entitled thereto, as such court shall deem just; the payment of costs may be directed in such manner as the court may deem equitable; the said judgment shall be conclusive and final in all collateral proceedings, but may be reviewed on writ of error by the court of errors and appeals.

29. *And be it enacted,* That if any corporation whose property and franchises have been or shall be valued and assessed under the provisions of the act to which this is a supplement, by the state board of assessors, shall pay or cause to be paid to the treasurer of the state the tax so assessed upon its property and its franchises at the times and in the same manner provided by law, or within fifteen days after the state board of assessors shall have made and declared their final revision of their valuations and assessments, that neither such payment nor the lapse of time in making application for a writ of certiorari shall be considered by any court or judge thereof as a reason why such corporation should not be entitled to such writ of certiorari upon any question adjudicated in favor of any corporation that may refuse to pay the taxes assessed against it, and that shall bring its writ of certiorari, to review the valuations and assessments within the time limited by the act to which this is a supplement; *provided,* application for writ of certiorari be made within six months after such question has been finally adjudicated,
191 and no other questions shall be considered on said writ.

30. *And be it enacted,* That this act shall be subject to amendments, alterations or repeal at the will of the legislature; the 'Act for the taxation of railroad and canal property,' approved April tenth, anno Domini eighteen hundred and eighty-four, which is by this act revised and amended, and the supplements thereto, approved February fifth and April fifth, anno Domini eighteen hundred and eighty-five, and all other acts inconsistent with the provisions of this act, are hereby repealed, except so far as herein re-enacted, but nothing in this repealer shall affect or impair the lien of any taxes heretofore assessed or any remedies for the collection of the same, or to surrender any remedies, powers, rights or privileges acquired by the state under said act hereby revised, or to relieve any person or corporation from any penalty imposed by said act and supplements, nor shall anything in this act be held to repeal the supplement to the said act hereby revised, which supplement was approved June tenth anno Domini eighteen hundred and eighty-six, nor shall this act affect the tenure of office of the present state board of assessors.

31. *And be it enacted,* That this act shall take effect immediately."

Approved March 27, 1888.

192 "EXHIBIT D" FOR IDENTIFICATION (Cont'd).

LAWS OF NEW JERSEY FOR THE TAXATION OF RAILROAD AND CANAL PROPERTY.

GENERAL PUBLIC LAWS OF 1888, PAGES 376, 377. CHAPTER CCLIX.

An Act to amend an act entitled "An act to revise and amend 'An act for the (taxation) of railroad and canal property,' approved April tenth, one thousand eight hundred and eighty-four," which was approved March twenty-seventh, one thousand eight hundred and eighty-eight.

1. *Be it Enacted by the Senate and General Assembly of the State of New Jersey,* That the eleventh section of an act to revise and amend an act entitled 'An act for the taxation of railroad and canal property,' approved April tenth, one thousand eight hundred and eighty-four, be and the same is hereby amended so as to read as follows:

2. *And be it enacted,* That the money collected under this act for the one-half of one per centum tax shall be applied to the uses of the State, according to law; the amount received for tax upon property separately assessed in the different taxing districts is hereby appropriated, and shall be allotted to the various taxing districts, giving to each district the amounts that was derived from the property of each railroad or canal company therein; the comptroller shall transmit to the collector of each county a certificate showing the amount allotted to the taxing districts therein, and shall draw his warrant upon the state treasury, in favor of the several county collectors, for the amounts allotted to their several counties, and the county collector shall forthwith pay to the collector, or other proper
193 officer of each taxing district, the amount allotted thereto, deducting, however, the amount due for county taxes from such taxing district; the amount thus paid to the county and taxing district shall be at the disposal of the proper authorities for public purposes; *provided, however,* that whenever the local city rate as fixed and assessed in any city exceeds one per centum of the ratables of such city, then in such case the comptroller shall transmit to the collector of taxes of said city a certificate showing the amount allotted to such city, and shall draw his warrant upon the state treasury in favor of the treasurer of such city for said amount; such warrant to be at the disposal of the board of such city having control of its finances, to be used for the municipal purposes of such city, such amount to be first applied to the purchase of such outstanding bonds or obligations of the city as can be bought below the par value thereof, and if no bonds or obligations can be bought below par, then such amount, or the balance, if any, shall be applied to the payment of such part of the city debt and interest falling due thereon as the said board having control of the finances of the city may determine.

2. *And be it enacted,* That this act shall take effect immediately.

Approved April 2, 1888.

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194 "EXHIBIT D" FOR IDENTIFICATION (Cont'd).

LAWS OF NEW JERSEY FOR THE TAXATION OF RAILROAD AND CANAL PROPERTY.

GENERAL PUBLIC LAWS OF 1891, PAGES 165, 166. CHAPTER XCVIII.

A supplement to an act entitled "An act to revise and amend 'An act for the taxation of railroad and canal property,' approved April tenth, one thousand eight hundred and eighty-four," approved March twenty-seventh, one thousand eight hundred and eighty-eight.

1. *Be it enacted by the Senate and General Assembly of the State of New Jersey,* That section two of the act to which this is a supplement, be amended to read as follows:

2. *And be it enacted,* That all property of any railroad and of any canal company used for railroad or canal purposes shall be assessed by a state board of assessors, which shall consist of four members, and shall be appointed by the governor, by and with the advice and consent of the senate; no person shall be qualified or authorized to act as a member of said board unless his appointment shall have been confirmed by the senate; their term of office shall commence on the first Monday of May; the assessors first appointed shall be appointed to hold office respectively for one, two, three and four years, and until the appointment of a successor; all subsequent appointments shall be for a term of four years and until the appointment of a successor; vacancies shall be filled by the governor, subject to the approval of the senate; the said assessors shall be citizens of this state, and shall not, during their term of office, be interested in any
195 railroad or canal company; each assessor shall, before entering upon his duties, file with the secretary of state an oath taken before a justice of the supreme court that he will faithfully discharge the duties of his office, and that he is not interested in any railroad or canal company; they shall each receive an annual salary of twenty-five hundred dollars; three members shall constitute a quorum, and any official act shall be valid which has the sanction of three members; they may employ a secretary, who shall receive an annual compensation as the board of assessors may determine, not to exceed twenty-five hundred dollars; they shall keep a record of their proceedings and shall annually report to the legislature.

2. *And be it enacted,* That this act shall take effect immediately.

Approved March 17, 1891.

196 EXHIBIT "E" FOR IDENTIFICATION.

LAWS OF THE COMMONWEALTH OF PENNSYLVANIA, SESSION OF 1889.

(p. 420.) No. 332.

A further supplement to an act entitled "An act to provide revenue by taxation," approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine.

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(p. 427.) SECTION 19. That hereafter no limited partnership, bank, joint-stock association, association, corporation or company whatsoever, formed, erected, incorporated or oganized by or under any law of this commonwealth, general or special, or formed, erected, incorporated or organized under the laws of any other state, and doing business in this commonwealth, shall go into operation, without first having the name of the institution or company, the date of incorporation or organization, the act of assembly or authority under which formed, incorporated or organized, the place of business, the post office address, the names of the president, chairman, secretary and treasurer or cashier, and the amount of capital authorized by its charter, and the amount of capital paid into the treasury, registered in the office of the auditor general; and every limited partnership, bank, association, joint-stock association, company or corporation whatsoever, now engaged in business in this comonwealth, shall within ninety days after the passage of this act, register as herein required in the office of the auditor general; all the corporations, companies, associations and limited partnerships
197 aforesaid, shall annually hereafter notify the auditor general of any change in their officers; and any such institution or company which shall neglect or refuse to comply with the provisions of this section, shall be subject to a penalty of five hundred dollars, which penalty shall be collected on an account settled by the auditor general and state treasurer in the same manner as taxes on capital stock are settled and collected.

SESSION OF 1891.

(p. 229.) No. 200.

An act to provide increased revenues for the purposes of relieving the burdens of local taxation, being supplementary to an act entitled "An Act to provide revenue by taxation," approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine, amending the first, fourteenth, sixteenth, twentieth, twenty-first, twenty-fifth and twenty-sixth sections of an act supplementary thereto, which became a law on the first day of June, Anno Domini one thousand eight hundred and eighty-nine, entitled "A further supplement to an act entitled 'An act to provide revenue by taxation,' approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine," and providing for greater uniformity of taxation by taxing all of the property of corporations, limited partnerships and joint-stock associations having a capital stock, at the rate of five mills on each dollar of its actual value.

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(p. 233.) SECTION 4. That section twenty of said act which reads as follows, to-wit,

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(p. 235.) be and the same is hereby amended so as to read as follows:

SECTION 20. That hereafter, except in the case of banks, 198 savings institutions and foreign insurance companies, it shall be the duty of the president, chairman or treasurer of every corporation, having capital stock, every joint-stock association and limited partnership whatsover, now or hereafter organized or incorporated by or under any law of this Commonwealth, and of every corporation, joint-stock association and limited partnership whatsoever, now or hereafter incorporated or organized by or under the laws of any other state or territory of the United States, or by the United States or by any foreign government, and doing business in and liable to taxation within this Commonwealth, or having capital or property employed or used in this Commonwealth by or in the name of any limited partnership, joint-stock association, company or corporation whatsoever, association or associations, co-partnership or co-partnerships, person or persons, or in any other manner, to make a report in writing to the Auditor General, in the month of November, one thousand eight hundred and ninety-two, and annually thereafter, stating specifically:

First. Total authorized capital stock.
Second. Total authorized number of shares.
Third. Number of shares of stock issued.
Fourth. Par value of each share.
Fifth. Amount paid into the treasury on each share.
Sixth. Amount of capital paid in.

Seventh. Amount of capital on which dividend was declared.

Eighth. Date of each dividend declared during said year ended with the first Monday of November.

Ninth. Rate per centum of each dividend declared.

199 Tenth. Amount of each dividend during the year ended with the first Monday in said month.

Eleventh. Gross earnings during the year.

Twelfth. Net earnings during said year.

Thirteenth. Amount of surplus.

Fourteenth. Amount of profit added to sinking fund during said year.

Fifteenth. Highest price of sales of stock between the first and fifteenth days of November aforesaid.

Sixteenth. Highest price of sales of stock during the year aforesaid.

Seventeenth. Average price of sales of stock during the year; and in every case any two of the following officers of such corporation, limited partnership or joint-stock association, namely: The president, chairman, secretary and treasurer, after being duly sworn or affirmed to do and perform the same with fidelity and according to the best of their knowledge and belief, shall, between the first and fifteenth days of November of each year, estimate and appraise the capital stock of the said company at its actual value in cash, not less, however, than the average price which said stock sold for during said year, and not less than the price or value indicated, or measured by net earnings or by the amount of profit made and either declared in dividends, or carried into surplus or sinking fund, and when the same shall have been so truly estimated and appraised they shall forthwith forward to the Auditor General a certificate thereof, accompanied with a copy of their said oath or affirmation, signed by them and attested by a magistrate or other person duly qualified to administer the same: Provided, That if the Auditor General and State Treasurer, or either of them, is not satisfied with the appraise-

200 ment and valuation so made and returned, they are hereby authorized and empowered to make a valuation thereof, based upon the facts contained in the report herein required, or upon any information within their possession, or that shall come into their possession, and to settle an account on the valuation so made by them for the taxes, penalties and interest due the Commonwealth thereon, with right to the company dissatisfied with any settlement so made against it to appeal therefrom in the manner now provided by law; and in the event of the neglect or refusal of the officers of any corporation, company, joint-stock association or limited partnership, for a period of sixty days, to make the report and appraisement to the Auditor General as herein provided, it shall be the duty of the Auditor General and State Treasurer to estimate a valuation of the capital stock of such defaulting corporation, company, joint-stock association or limited partnership, and settle an account for taxes, penalty and interest thereon, from which settlement there shall be no right of appeal."

"EXHIBIT E" FOR IDENTIFICATION (Cont'd).

SESSION OF 1893.

(p. 353.) No. 288.

An act being a further supplement to an act entitled "An act to provide revenue by taxation," approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine, amending the amendment of the supplement thereto, which became a law on the first day of June, Anno Domini one
201 thousand eight hundred and eighty-nine, which amendment herein amended was approved the eighth day of June, Anno Domini one thousand eight hundred and ninety-one, relating to the tax on capital stock.

SECTION 1. Be it enacted, &c., that the twenty-first section of an act which became a law on the first day of June, Anno Domini one thousand eight hundred and eighty-nine, entitled "A further supplement to an act entitled 'An act to provide revenue by taxation,' approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine, as the said section is amended by an act approved the eight- day of June, Anno Domini one thousand eight hundred and ninety-one," which reads as follows, to-wit:

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be and the same is hereby amended so as to read as follows:

SECTION 21. That every corporation, joint-stock association, limited partnership and company whatsoever, from which a report is required under the twentieth section hereof, shall be subject to and pay into the treasury of the Commonwealth, annually, a tax at the rate of five mills upon each dollar of the actual value of its whole capital stock of all kinds, including common, special and preferred, as ascertained in the manner prescribed in the said twentieth section, and it shall be the duty of the treasurer or other officers having charge of any such corporation, joint-stock association or limited partnership, upon which a tax is imposed by this section, to transmit the amount of said tax to the treasury of the Commonwealth within thirty days from the date of settlement of the account by the Auditor General and State Treasurer; *Provided*, That for the purposes of this act, interests in limited partnerships or joint-
202 stock associations shall be deemed to be capital stock and taxable accordingly; *Provided, also*, That corporations, limited partnerships and joint-stock associations, liable to tax on capital stock under this section, shall not be required to make and report or pay any further tax on the mortgages, bonds and other securities owned by them in their own right; but corporations, limited partnerships and joint-stock associations holding such securities as trustees, executors, administrators, guardians, or in any other manner, shall return and pay the tax imposed by this act upon all securities so held by them as in the case of individuals: *And provided further,*

That the provisions of this section shall not apply to the taxation of so much of the capital stock of corporations, limited partnerships or joint-stock associations, organized for manufacturing purposes, which is invested in and actually and exclusively employed in carrying on manufacturing within the State, except companies engaged in the brewing or distilling of spirits or malt liquors and such as enjoy and exercise the right of eminent domain; but every manufacturing corporation, limited partnership or joint-stock association shall pay the State tax of five mills herein provided, upon such proportion of its capital stock, if any, as may be invested in any property or business not strictly incident or appurtenant to its manufacturing business, in addition to the local taxes assessed upon its property in the districts where located, it being the object of this proviso to relieve from State taxation only so much of the capital stock as is invested purely in the manufacturing plant and business: *Provided further,* In case of fire or marine insurance companies the tax imposed by this section shall be at the rate of three mills on each dollar of the actual value of the whole capital stock.

Approved June 8, 1893.

203 "EXHIBIT E" FOR IDENTIFICATION (Cont'd).

SESSION OF 1889.

No. 332.

(p. 431.) "SECTION 23. That every railroad company, pipe line company, conduit company, steamboat company, canal company, slack water navigation company, transportation company, street passenger railway company, and every other company, joint-stock association or limited partnership, now or hereafter incorporated or organized by or under any law of this Commonwealth, or now or hereafter organized or incorporated by any other State or by the United States or any foreign government, and doing business in this Commonwealth, and owning, operating or leasing to or from another corporation, company, association, joint stock association or limited partnership, any railroad, pipe line. slack water navigation, street passenger railway, canal or other device for the transportation of freight or passengers or oil, and every telephone or telegraph company incorporated under the laws of this or any other State or of the United States and doing business in this Commonwealth, and every express company, incorporated or unincorporated, doing business in this Commonwealth, and every firm, co-partnership or joint-stock company or association doing express business in this Commonwealth, and every electric light company, and every palace car and sleeping car company, incorporated or unincorporated, doing business in this Commonwealth, shall pay to the state treasurer a tax of eight mills upon the dollar upon the gross receipts of said corporation, company or association, limited partnership, firm or co-partnership, received from passengers and freight traffic transported wholly within this

State, and from telegraph, telephone or express business
204 done wholly within this State, or from business of electric light companies, and from the transportation of oil done wholly within the State; the said tax shall be paid semi-annually upon the last days of January and July in each year; and for the purpose of ascertaining the amount of the same, it shall be the duty of the treasurer or other proper officer of the said company, firm, co-partnership, limited partnership, joint-stock association or corporation, to transmit to the auditor general a statement, under oath or affirmation, of the amount of gross receipts of the said companies, co-partnerships, corporations, joint-stock associations or limited partnerships derived from all sources, and of gross receipts from business done wholly within the State, during the preceding six months ending on the first days of January and July in each year; and if any such company, firm, co-partnership, joint-stock association, association or limited partnership or corporation, shall neglect or refuse for a period of thirty days after such tax becomes due, to make said returns or to pay the same, the amount thereof with an addition of ten per centum thereto, shall be collected for the use of the Commonwealth as other taxes are recoverable by law; *Provided*, That in any case where the works of one corporation, company, joint-stock association or limited partnership are leased to and operated by another corporation, company, association or limited partnership, the taxes imposed by this section shall be apportioned between the said corporations, companies, associations or limited partnerships, in accordance with the terms of their respective leases or agreements, but for the payment of the said taxes, the Commonwealth shall first look to the corporation, company, association or limited part-
205 nership operating the works, and upon payment by the said company, corporation, association or limited partnership of a tax upon the receipts as herein provided derived from the operation thereof, the corporation, company, joint-stock association or limited partnership from which the said works are leased, shall not be held liable under this section for any tax upon the proportion of said receipts received by it as rental from the use of said works.

SESSION OF 1889.

No. 332.

(p. 437.) SECTION 31. That all taxes imposed by this act shall be a lien upon the franchises and property, both real and personal, of corporations, companies, associations, joint-stock associations and limited partnerships, from the time the said taxes are due and payable; and whenever the franchises or property of a corporation, company, association, joint-stock association or limited partnership shall be sold at a judicial sale, all taxes due the Commonwealth shall first be allowed and paid out of the proceeds of such sale, before any judgment, mortgage or other claims which shall be entered of record or become a lien after the passage of this act.

206 "EXHIBIT F" FOR IDENTIFICATION.

PENNSYLVANIA COUNTY COURT REPORTS, VOLUME 14, PAGE 440.

COMMONWEALTH
vs.
DELAWARE, SUSQUEHANNA & SCHUYLKILL RAILROAD COMPANY.

Corporations—taxation of capital stock—minimum value—actual value—tangible property and assets—franchises and privileges—material results realized therefrom—section 4, revenue act of 1891, P. L., 229—preamble of act of 1891.

The intent and meaning of Sec. 4 of the revenue act of 1891 is that only so much of the income of a corporation—using this word as an equivalent for both net earnings and amount of profit made—as is "made and either declared in dividends or carried into surplus or sinking fund" is to be taken as the test of minimum value in appraising the capital stock of a corporation: Commonwealth *vs.* Sharon Coal Co., 14 Pa. C. C. R., 222.

The amount and rate per cent. of dividends made and the amount carried into surplus or sinking fund during the tax year do not furnish an absolute indication or measure of the actual value in cash of the capital stock, but are to be considered with all other relevant facts in determining what is its actual value in cash: Commonwealth *vs.* Sharon Coal Co., 14 Pa. C. C. R., 222; Commonwealth *vs.* Edgerton Coal Co., 14 Pa. C. C. R.

The tax on capital stock imposed by the taxing acts of Pennsylvania is not a franchise or license tax, but is a tax on the property and assets of a corporation: Commonwealth *vs.* Standard Oil Co., 101 Pa., 119.

207 The capital stock represents not only the property and assets of a corporation, but also the value of its franchises and privileges and facilities for doing business and the success with which the business is actually carried on, so far as these are denoted and expressed by the pecuniary results realized; these elements of value are intended to be reached by the tax on capital stock by the express terms of the act of 1891.

Tax on capital stock.

C. P. Dauphin Co. March Term, 1893. No. 302.

Hensel, Attorney-General for the Commonwealth, and Lamberton, for the defendant.

SIMONTON, *P. J.:*

This is an appeal by the corporation defendant from the settlement of an account against it by the auditor general and state treasurer of tax on capital stock for the year ending first Monday of November, 1892, and it was tried by the court without a jury under the act of April 22, 1874.

Findings of Fact.

1. Defendant is and was during the year 1892 a corporation of and doing business in the State of Pennsylvania chartered in April, 1890, with an authorized capital stock of $1,000,000, of which $400,000 was paid in prior to June, 1892, and the balance at that time. Its railroad is located in the anthracite coal region of eastern Pennsylvania, and including branches is about 60 miles in length. It runs in a devious course, and thus and by means of branches from the main line reaches a number of collieries, nearly all of which are owned and controlled by the firm of Coxe Brothers & Co., who also own nearly all the shares of stock in the railroad company;
208 it was built for the purpose of connecting these collieries with the various railroads that traverse that region, and does not connect with the Pennsylvania, the Reading, the Lehigh Valley and the Jersey Central railroads; thus giving the owners of these collieries and of this railroad not merely access to the various markets for coal, east, north and west, but also a choice of roads over which to reach these markets and with which to make traffic contracts. Nearly all of the freight carried by the defendant is coal, and should this traffic fail or be withdrawn its capital stock would be comparatively valueless; but there is no evidence in the case tending to show that there is any present prospect that this will occur; and in view of the fact that these railroads and these collieries are owned by the same persons, it does not seem probable, so long as the coal mines are not exhausted; nor is there any evidence that this will take place for many years to come.

2. The gross earnings of the defendant during the year 1892 were $739,914.15 and its net earnings were $523,243.15, and it made one dividend during the year, on October 15th, 1892, of 40%, amounting to $400,000, out of net earnings realized to June 30, 1892; its net earnings from June 30, 1892, to February 28, 1893, were about $450,000, and the amount of its surplus on the first Monday in November, 1892, was $242,142.89, in addition to book accounts amounting to about $100,000 in excess of its current indebtedness; and there is no evidence in the case tending to show that its net earnings will be less in the future, except in so far as they may be affected by the general financial depression. The total cost of defendant's railroad, which was completed in February, 1893, including equipment, was $1,159,323.70.

3. Defendant's president and treasurer made to the auditor
209 general, under the sanction of the prescribed oath, the report and appraisement required by sec. 4 of the act of 1891 (P. L. 229), appraising defendant's capital stock of $2,000,000, which is double its par value. There were no sales of shares of the stock during the tax year.

4. The auditor general and the state treasurer were not satisfied with and did not accept this appraisement; but, as they understood to be their duty under the law, made an appraisement and fixed the value of said capital stock at $8,720,719.16. In making this appraisement they had before them no other evidence of its actual value

than that contained in the report made by the officers of the corporation as above stated; and this amount was adopted by them as the value of the capital stock because it was the sum which at six per cent. would produce $523,234.15, the amount of net earnings made by the defendant as shown by said report. On this valuation so made by the auditor general and state treasurer an account was settled against defendant for tax at the rate of 5 mills, amounting to $43,603.59, from which settlement defendant duly appealed to this court.

5. We find from the evidence that the actual value of the defendant's capital stock between the first and 15th days of November, 1892, was not $8,720,719.16, the amount at which it was appraised by the auditor general and state treasurer; but having in view from the evidence, considering all the facts which are in our judgment relevant on the principles more fully explained below, we find that the actual value in cash of the defendant's capital stock at the date mentioned was $4,000,000.

We have decided in opinions recently filed in Com. *v.* Sharon Coal Co., 23, June Term, 1893 (14 Pa. C. C. R., 222), in Com. *v.*
210 Edgerton Coal Co., 21, June Term, 1893, that the intent and meaning of sec. 4 of the revenue act of 1891, P. L. 229, is that only so much of the income of a corporation—using this word as an equivalent for both net earnings and amount of profit made—as is "made and either declared in dividends or carried into surplus or sinking fund" is to be taken as the test of minimum value in appraising the capital stock of a corporation; and that the amount and rate per cent. of the dividends made and the amount carried into surplus or sinking fund during the tax year do not furnish an absolute indication or measure of the actual value in cash of the capital stock, but are to be considered with all other relevant facts in determining what is its actual value in cash.

These decisions settle for us the law of this case on the points thus described and lead to the result that the appraisement made by the auditor general and state treasurer and the settlement based thereon cannot be sustained merely as a conclusion of law, but must stand or fall on the actual facts of the case; in other words, the question we have to decide on this appeal is what is the actual value in cash of the defendant's capital stock.

It has been settled by numerous decisions which are cited and affirmed in Com. *vs.* Standard Oil Co., 101 Pa., 119, that the tax on capital stock imposed by the taxing acts of this state is not a franchise or license tax, but is a tax on the property and assets of a corporation. But it by no means follows that the capital stock and the tangible property and assets are identical either in substance or in value. The capital stock, it is true, represents the property and assets of the corporation, but it represents also the value of its franchises and privileges and facilities for doing business and the success with
which the business is actually carried on, so far as these are
211 denoted and expressed by the pecuniary results realized; and the tax on capital stock is by the express terms of the act of 1891 intended to reach these elements of value. See preamble 6 P. L., 1891, p. 229.

The case of Com. *v.* Hamilton Manufacturing Co., 12 Allen, 298, contains an admirable discussion and exposition by Bigelow, *C. J.*, of the difference which may exist between the value of the tangible property and the assets of a corporation and the value of its capital stock, which is so apt for our purpose that we make copious extracts therefrom, with the remark that the whole opinion ought to be read in its connection. Assuming that the value of the capital stock of a corporation is equal to the value of all its shares—the theory of the act of 1891, which makes the market price of the shares a test of the actual value of the capital stock—he says: "The aggregate market value of all shares, by which we understand the cash price for which the shares will sell in the market, does not necessarily indicate the actual value or amount of property which a corporation may own. The price for which all the shares would sell may greatly exceed the aggregate of the corporate property or it may fall very short of it. Undoubtedly the amount of property belonging to a corporation is one of the considerations which enters into the market value of its shares; but such market value also embraces other essential elements. It is not made up solely by the valuation or estimate which may be put on the corporate property, but it also includes the profits and gains which have attended its operations, the prospects of its future success, the nature and extent of its corporate rights and privileges and the skill and ability with which its business is managed. In other words, it is the estimate put on the potentiality of a cor-
212 poration, on the capacity to avail itself profitably of its franchise, and on the modes in which it uses its privileges as a corporate body, which materially influences and often controls the market value." "There may be two corporations organized with similar powers, having the same number of shares, the same amount of property, of capital, and both may be engaged in the same branch of business; the market value of the shares in one corporation may be double that of the other, because one is prosperous and likely to make large gains, while the other is unsuccessful and is carrying on a business which may prove unprofitable or lead to heavy loss. The tax is therefore laid not on capital stock as signifying the money paid in to carry on the business of the corporation or the property purchased and owned by the corporation, but on the capital stock representing the aggregate of the market value of the shares. The price for which these shares may be sold does not depend upon the value or amount of property belonging to a corporation, but rather on the capacity of a corporation to use its property in connection with its corporate powers and privileges advantageously and profitably and upon the present prosperity, prospective earnings and profitable final results of the corporate business." "Nor are we able to see any reason why the aggregate market value of all the shares of a corporation, representing as it does the estimate put not merely on the property of a corporation but also on the rights, privileges, capacities and present and prospective results of the corporate organization and business—in other words, on its franchise—is not a legitimate and just method of arriving at a basis on which to calculate an excise or tax."

These extracts, and still more the whole opinion from which they are taken, abundantly show that the actual value in cash of
213 defendant's capital stock is not to be determined solely by ascertaining the value of its tangible property and assets, but that many other elements of value are to be considered. Chief Justice Bigelow's discussion, it is true, leads him to the conclusion that the tax he is considering is a franchise tax, and not a tax on tangible property; but this view of the case was considered in the Supreme Court of the United States in Hamilton Co. *v.* Massachusetts, 6 Wall. 632, was accepted only because it was thought to be required by the peculiar provision of the constitution of the state of Massachusetts, and the construction which had long been put upon it by the Supreme Court of that State, which as a question of the construction of a state statute was binding on the federal court. Thus Mr. Justice Clifford, delivering the opinion and referring to the decision that the tax in question was a franchise tax, at page 639 said: "Separate from the peculiar provision of the state constitution and the long practice under the original decision" (in Portland Bank *v.* Apthorp, 12 Mass. 252) "the present decision of the state court upon the subject might well be criticised as founded in unsubstantial distinctions, but when weighed as an exposition of that peculiar clause" (of the state constitution) "and in view of the long practice of the state, commencing long before the prior decision was made, it is not possible to withhold from the conclusion a full and unqualified concurrence * * * fifty years have elapsed since that decision was made and the practice in substance and effect is still continued, having been repeatedly sanctioned by the unanimous decisions of the highest judicial authority of the state."

The Chief Justice and Justices Greer and Miller refused to be bound by the construction put upon the statute by the state court and dissented on the ground that the tax in question was a
214 tax on the property of the corporation and not a franchise tax.

On the subject of taxing corporate franchises as property Justice Clifford said: "Corporate franchises * * * are legal estates and not mere naked powers granted to the corporations, but powers coupled with an interest which rest in the corporation by virtue of their charter, and * * * the privileges and franchises of a private corporation unless exempt in terms which amount to a contract, are as much the legitimate subjects of taxation as any other property of the citizens within the sovereign power of the state."

And in Wilmington Railroad *v.* Reid, 13 Wall. 264, Mr. Justice Davis, delivering the opinion of the court, said: "It is insisted, however, that the tax on the franchise is something entirely distinct from the property of the corporation, and that the legislature was not therefore inhibited from taxing it. Nothing is better settled than that the franchise of a private corporation * * * which in its application to a railroad is the privilege of running it and taking fares and freight * * * is property, and of the most valuable kind, as it cannot be taken for public use even without compensation. It is true it is not the same sort of property as the rolling stock, roadbed

and depot grounds, but it is equally with them covered by the general term 'the property of the company.'"

There is therefore no legal principle in the way of holding that the tax on capital stock in this state is a tax on property and at the same time including in the appraisement the value of the franchises and privileges enjoyed and exercised by the corporation, and determining the value of these by the material result of their exercise.

Acting on the principle suggested by the foregoing dis-
215 cussion the members of this court, both of whom sat at the trial, concur in the findings of fact above set forth, and in the conclusion that the defendant's capital stock was between the first and fifteenth days of November, 1892, of the actual value in cash of $4,000,000; and the commonwealth is therefore entitled to judgment as follows:

Value of the capital stock.....		$4,000,000 00
Tax, 5 mills.....	$20,000 00	
Interest from April 1, 1893, to January 1, 1894, at 12% per annum.....	1,800 00	
Attorney-General's commission, 5%....	1,000 00	
Total	$22,800 00	

for which amount judgment is directed to be entered in favor of the commonwealth and against the defendant, if exceptions be not filed within the time limited by law.

107 Pennsylvania State, 156.

Pullman's Palace Car Co. *v.* Commonwealth, No. 2.

1. Under the acts of assembly of Pennsylvania imposing state tax on capital stock of corporations doing business in this state, Pullman's Palace Car Company, a foreign corporation, is liable to taxation on the proportion of its capital stock invested in Pennsylvania as represented by the cars used by it in the state, whether such cars be owned or leased by said company. The fact that said cars are continuously run into, through and out of this state and are also operated in other states does not exempt the company from taxation here; it but reduces the valuation upon which the company is taxable.

216 2. Such construction of said acts of assembly does not render the same obnoxious to the provision of the federal constitution regulating interstate commerce.

June 6, 1884. Before Mercur, *C. J.*, and Gordon, Paxson, Turnkey, Sterrett, Green and Clark, *JJ.*

Error to the Court of Common Pleas of Dauphin County of May term, 1883. No. 35.

This case was in the court below and appealed by Pullman's Palace Car Company from a settlement of account by the auditor general

and state treasurer charging the said corporation with a tax on its capital stock for the years 1870 to 1880 inclusive, under the provisions of the acts of May 1, 1868, April 24, 1874, section 4, March 20, 1877, and June 7, 1879. The account was based upon the estimated rate of dividends in each year and upon the estimated proportion of capital stock taxable for Pennsylvania, and included interest and penalties for failure to report.

The defendant filed specifications of objection and the case was tried by agreement under the act of April 22, 1874, without a jury, before Simonton, *P. J.*, whose findings of fact and conclusions of law were as follows:

The defendant is a corporation of the state of Illinois, having its principal office in Chicago. Its business was during all the time for which tax is charged, to furnish sleeping coaches and parlor and dining-room cars to various railroad companies with which it contracted, on the following terms: The defendant furnished the coaches and cars, and the railroad companies attached and made them part of their trains, no charge being made by either party against the other. The railroad companies collected the usual fare from passengers who travelled in their coaches and cars, and
217 the defendant collected a separate charge for the use of the seats, sleeping berths and other conveniences. Business has been carried on continuously by the defendant in this way in Pennsylvania since February 17, 1870, and it has had about 100 coaches and cars engaged in this way in this state during that time.

About the time defendant began operations in this state, a corporation thereof called the Central Transportation Company was engaged in a like business here and had contracts with many of the railroad companies in the state to run parlor and sleeping cars on the terms stated above.

Defendant found it for its interest to purchase said contracts from said company and lease its cars for a period of 99 years, at an annual rental, covenanting to keep the cars in repair and return them or others in their place in as good order as when received at the end of that period. These cars, or most of them, as well as some of the other cars belonging to the defendant, have ever since been running in, into, through and out of the state.

The following additional facts were found by the Court:

1. That defendant transacted no business in Pennsylvania except upon the roads and in the cars covered by its lease with the Central Transportation Company.

2. That defendant leased 119 cars from the Central Transportation Company, and that said cars were more than sufficient for the transportation of all the business done by it within the State of Pennsylvania, no more than 100 cars being used in said State in any year.

3. That the cars used in the state of Pennsylvania were
218 also used in other states; their use in Pennsylvania being confined to passengers to or from points in other states.

4. That the rental paid to the Central Transportation Company for the use of its cars exceeded the gross receipts of the defendant from all its business within the state of Pennsylvania.

5. That the Central Transportation Company is a corporation of the state of Pennsylvania, and has paid to the state the full tax upon its entire capital stock for each of the years embraced in this suit.

On the facts defendant claims that no part of its capital stock is invested in this state. The argument is that its cars are personal property, and as they are not permanently located in this state, but pass into, through and out of it, this personal property has no taxable *situs* in Pennsylvania, and cannot be taxed specifically in any given locality, and therefore it is contended as the tax on capital stock is a tax on the property in which that capital is invested, the latter cannot be taxed.

It has certainly been settled by Commonwealth *v.* Standard Oil Company, 5 Out. 119, that "a tax upon the capital stock of the company is a tax upon its property and assets."

But it has never yet, so far as we know, been decided that the capital stock of a company and its property and assets are identical, or that any given part of the former represents any specific articles of the latter. It would be carrying the principle to a dangerous extreme to so decide. We hold, therefore, that the proportion of the capital stock of the defendant invested and used in Pennsylvania is taxable under these acts, and that the amount of the tax may be properly ascertained by taking as a basis the proportion which the number of miles operated by defendant in this state bears
219 to the whole number of miles operated by it, without regard to the question where any particular car or cars were used. Nor is it in our opinion of any consequence that some of the cars were leased for 99 years from another company on the conditions stated in the findings of fact above.

We need not even stop to determine the precise nature of the property which defendant has in them. Whatever it be, it is an asset of the company and is therefore represented by and helps to give value to its capital stock. It cannot change the case that the lessor company pays tax on its capital stock; that represents its interest, if any, in these cars. The questions involved need no further elaboration; we therefore briefly state the conclusions of law which we think are involved in the case:

1. The defendant is liable to tax on the proportion of its capital stock invested in this state as represented by coaches and cars owned and used by it here.

2. The fact that some of said coaches and cars have been leased from the Central Transportation Company for 99 years does not affect such liability.

3. The laws under which said taxes are imposed and said liability accrues are not in conflict with section 8 of article 1 of the Constitution of the United States.

4. Said company is not chargeable with penalty for failure to report, and with interest only from 60 days after the date of the settlement.

Determining the amount of the tax on the principles above stated it is as follows:

220	Tax for the years 1870 to 1880, inclusive.....	$16,321.89
	Interest from May 1, 1881, to May 10, 1883....	3,971.65
	Attorney-General's commission.....	816.09
	Total	$21,109.63

for which amount let judgment be entered unless exception be filed according to law.

The defendant excepted to the foregoing conclusions of law (other than the 4th) and filed the following additional exceptions:

9. The court erred in not finding as a conclusion of law that Pullman's Palace Car Company is not liable for taxation upon its own capital stock by reason of the cars leased from the Central Transportation Company.

10. The court erred in not finding as a conclusion of law that defendant being a corporation of the state of Illinois, is not taxable upon any proportion of its capital stock by reason of its permitting its cars to be transported into, out of or through this state, so long as they do not obtain a *situs* here.

11. The court erred in directing judgment to be entered in favor of the Commonwealth for $21,109.63.

12. The court erred in not ordering judgment to be entered in favor of defendant.

The court overruled the above exceptions and judgment was duly entered for the Commonwealth in accordance with the above decision. The defendant took this writ of error, assigning for error the dismissing of said exceptions, and the judgment.

M. E. Olmsted and O. A. Lochrane for plaintiff in error.

221 The claim in this case is controlled by the decision in Com'th *v.* Standard Oil Co., 5 Out. 119, that a tax upon capital stock is a tax upon property and assets within the state. But the Pullman Car Company had no capital invested in Pennsylvania aside from the inference sought to be drawn from its contract with the Central Transportation Company, a Pennsylvania corporation. For the convenience of the travelling public by avoiding repeated changes of cars upon connecting lines and over long routes of railroad, and to avoid inconvenience incident to the maintenance of this business under two different managements, it was found expedient in 1870 to enter into an agreement whereby Pullman's Palace Car Company became the lessee of the 119 cars of the Central Transportation Company, and undertook to perform the contracts of the latter company with the various railroads in Pennsylvania and elsewhere. By that contract the ownership of the cars remained in the Central Transportation Company, and that company has paid tax to the state on its entire capital stock, *i. e.*, on its entire property, which includes tax on these cars. To tax these cars again in the name of the Pullman Company is double taxation, not contemplated by the act of assembly. The Court found as a fact that no portion of the dividends of the Pullman Company accrued from the operation of these cars in Pennsylvania, for the rental paid to the Central Trans-

portation Company exceeded the gross receipts derived from the use of these cars in Pennsylvania.

But even if the Pullman Company owned the cars it would not be subject to taxation in respect thereof in Pennsylvania; The Pullman Company is a foreign corporation, and its cars are only temporarily in Pennsylvania while in transit to or from points in other
222 states; the cars have no *situs* here, and while being transported into, through and out of the state are protected from taxation by the commercial clause of the Federal Constitution.

State tax on foreign held bonds, 15 Wall. 319; Morgan *v.* Parham, 16 Wall. 471; St. Louis *v.* Ferry Co., 11 Wall. 423; Delaware Railroad Tax Case, 18 Wall. 229; Hays *v.* Pacific Mail S. S. Co., 17 How. 596; Com'th *v.* Standard Oil Co., 5 Out. 119; Appeal Tax Court of Baltimore Co. *v.* Pullman's Palace Car Co., 5 Md. 452.

Lewis C. Cassidy, Attorney General, and Robert Snodgrass, Deputy Attorney-General for the Commonwealth.

The opinion of the Court was delivered October 6, 1884. *Per Curiam:* We think it very clear that the plaintiff in error is engaged in carrying on such a business within this commonwealth as to subject it to the statutes imposing taxation. While a tax on the capital stock of a company is a tax on its property and assets, yet the capital stock of the company and its property and assets are not identical. The coaches of the company are its property. They are operated within this state. They are daily passing from one end of the state to the other. They are used in performing the functions for which the corporation was created. The fact that they are also operated in other states cannot wholly exempt them from taxation here. It reduces the value of the property in this state justly subject to taxation here. This was recognized in the Court below and we think the proportion was fixed according to a just and equitable rule.

Judgment affirmed.

223 EXHIBIT F FOR IDENTIFICATION (Cont'd).

141 UNITED STATES REPORTS, PP. 18–36.

PULLMAN'S PALACE CAR COMPANY
v.
PENNSYLVANIA.

Error to the Supreme Court of the State of Pennsylvania.

No. 1. Argued October 18, 1888.—Re-argument ordered November 5, 1888.—Re-argued March 6, 1890.—Decided May 25, 1891. A statute of a State, imposing a tax on the capital stock of all corporations engaged in the transportation of freight or passengers within the State, under which a corporation of another State, engaged in running railroad cars into, through and out of the State, and having at all times a large number of such cars within the State, is taxed by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within

the State bears to the whole number of miles in this and other States over which its cars are run, does not, as applied to such a corporation, violate the clause of the Constitution of the United States granting to Congress the power to regulate commerce among the several States.

This was an action brought by the State of Pennsylvania against Pullman's Palace Car Company, a corporation of Illinois, in the Court of Common Pleas of the county of Dauphin, in the State of Pennsylvania, to recover the amount of a tax settled by the auditor general and approved by the treasurer of that State, for the years 1870 to 1880 inclusive, on the defendant's capital stock, taking as the basis of assessment such proportion of its capital stock as
224 the number of miles of railroad over which cars were run by the defendant in Pennsylvania bore to the whole number of miles in this and other States over which its cars were run.

All these taxes are levied under successive statutes of Pennsylvania, imposing taxes on capital stock of corporations, incorporated by the laws of Pennsylvania or of any other State, and doing business in Pennsylvania, computed on a certain percentage of dividends made or declared. The taxes for 1870-1874 were levied under the statute of May 1, 1868, c. 69, sec. 5, which applied to corporations of every kind, with certain exceptions not material to this case, and fixed the amount of the tax at half a mill on every one per cent. of dividend. Penn. Laws, 1868, p. 109. The taxes for 1875–1877 were levied under the statute of April 24, 1874, c. 31, sec. 4, which applied to all corporations in any way engaged in the transportation of freight or passengers, and fixed the tax at nine-tenths of a mill on every one per cent. of dividend, Penn. Laws, 1874, p. 70. The taxes for 1878–1880 were levied under the statutes of March 20, 1877, c. 5, sec. 3, and of June 7, 1879, c. 122, sec. 4, applicable to all corporations, except building associations, banks, savings institutions and foreign insurance companies, and fixing the tax at half a mill on each one per cent. of dividends of six per cent. or more on the par value of the capital stock, and, when the dividend was less, at three mills on a valuation of the capital stock. Penn. Laws, 1877, p. 8; 1879, p. 114.

A trial by jury was waived, and the case submitted to the decision of the Court, which found the following facts: "The defendant is a corporation of the State of Illinois, having its principal office in Chicago. Its business was, during all the time for which tax
225 is charged, to furnish sleeping coaches and parlor and dining-room cars to the various railroad companies with which it contracted on the following terms: The defendant furnished the coaches and cars, and the railroad companies attached and made them part of their trains, no charge being made by either party against the other. The railroad companies collected the usual fare from passengers who travelled in their coaches and cars, and the defendant collected a separate charge for the use of the seats, sleeping berths and other conveniences. Business has been carried on continuously by the defendant in this way in Pennsylvania since February 17, 1870, and it has had about one hundred coaches and cars

engaged in this way in the State during that time. The cars used in this State have, during all the time for which tax is charged, been running into, through and out of this State."

Upon these facts the Court held "that the proportion of the capital stock of the defendant invested and used in Pennsylvania is taxable under these acts; and that the amount of the tax may be properly ascertained by taking as a basis the proportion which the number of miles operated by the defendant in this State bears to the whole number of miles operated by it, without regard to the question where any particular car or cars were used," and therefore gave judgment for the State.

That judgment was affirmed, upon writ of error, by the Supreme Court of the State, for reasons stated in its opinoin as follows: "We think it very clear that the plaintiff in error is engaged in carrying on such a business within this Commonwealth, as to subject it to the statutes imposing taxation. While the tax on the capital stock of a company is a tax on its property and assets, yet the capital stock of a company and its property and assets are not iden-
226 tical. The coaches of the company are its property. They are operated within this State. They are daily passing from one end of the State to the other. They are used in performing the functions for which the corporation was created. The fact that they are also operated in other States cannot wholly exempt them from taxation here. It reduces the value of the property in this State, justly subject to taxation here. This was recognized in the court below, and we think the proportion was fixed according to a just and equitable rule." 107 Penn. St. 156, 160.

Pullman's Palace Car Company sued out a writ of error from this court, and filed six assignments of error, the substance of which was summed up in the brief of its counsel as follows: "The court erred in holding that any part of the capital stock of the Pullman Company was subject to taxation by the State of Pennsylvania by reason of its running any of its cars into, out of, or through the State of Pennsylvania in the course of their employment in the interstate transportation of railway passengers."

Mr. Edward S. Isham and Mr. William Barry argued for the plaintiff in error at the argument on the 18th of October, 1888.

Mr. Edward S. Isham and Mr. John S. Runnells argued for the plaintiff in error at the argument on the 6th of March, 1890.

Mr. W. S. Kirkpatrick, Attorney General of the State of Pennsylvania, argued for the defendant in error at both arguments. Mr. John F. Sanderson, Deputy Attorney General of that State, was with him on the brief in both cases.

Mr. Justice Gray, after stating the case as above, delivered the opinion of the Court.

Upon this writ of error, whether this tax was in accordance
227 with the law of Pennsylvania is a question on which the decision of the highest Court of the State is conclusive. The only question of which this Court has jurisdiction is whether the tax was in violation of the clause of the Constitution of the United States granting to Congress the power to regulate commerce among

the several States. The plaintiff in error contends that its cars could be taxed only in the State of Illinois, in which it was incorporated and had its principal place of business.

No general principles of law are better settled, or more fundamental, than that the legislative power of every State extends to all property within its borders, and that only so far as the comity of that State allows can such property be affected by the law of any other State. The old rule, expressed in the maxim *mobilia sequuntur personam*, by which personal property was regarded as subject to the law of the owner's domicil, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*, the law of the place where the property is kept and used. Green *v.* Van Buskirk, 5 Wall. 307, and 7 Wall. 139; Hervey *v.* Rhode Island Locomotive Works, 93 U. S., 664; Harkness *v.* Russell, 118 U. S. 663, 679; Walworth *v.* Harris, 129 U. S. 355; Story on Conflict of Laws, sec. 550; Wharton on Conflict of Laws, secs. 297–311. As observed by Mr. Justice Story, in his commentaries just cited, "although movables are for many purposes to be deemed to have no *situs*, except that of the domicil of the owner, yet this being but a legal fiction, it
228 yields whenever it is necessary for the purpose of justice that the actual *situs* of the thing should be examined. A nation within whose territory any personal property is actually situate has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there."

For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner; and he may be taxed, on its account, at the place where it is, although not the place of his own domicil, and even if he is not a citizen or a resident of the State which imposes the tax. Lane County *v.* Oregon, 7 Wall. 71, 77; Railroad Co. *v.* Pennsylvania, 15 Wall. 300, 323, 324, 328; Railroad *v.* Peniston, 18 Wall. 5, 29; Tappan *v.* Merchants' Bank, 19 Wall. 490, 499; State Railroad Tax Cases, 92 U. S., 575, 607, 608; Brown *v.* Houston, 114 U. S. 622; Coe *v.* Errol, 116 U. S. 517, 524; Marye *v.* Baltimore & Ohio Railroad, 127 U. S. 117, 123.

It is equally well settled that there is nothing in the Constitution or laws of the United States which prevents a State from taxing personal property employed in interstate or foreign commerce like other personal property within its jurisdiction. Delaware Railroad Tax, 18 Wall. 206, 232; Telegraph Co. *v.* Texas, 105 U. S. 460, 464; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 206, 211; Western Union Telegraph Co. *v.* Attorney General of Massachusetts, 125 U. S. 530, 549; Marye *v.* Baltimore & Ohio Railroad, 127 U. S. 117, 124; Leloup *v.* Mobile, 127 U. S. 640, 649.

Ships or vessels, indeed, engaged in interstate or foreign commerce

upon the high seas, or other waters which are a common high-
229 way, and having their home port, at which they are regis-
tered under the laws of the United States, at the domicil of their owners in one State, are not subject to taxation in another State at whose ports they incidentally and temporarily touch for the purpose of delivering or receiving passengers or freight. But that is because they are not, in any proper sense, abiding within its limits, and have no continuous presence or actual *situs* within its jurisdiction, and, therefore, can be taxed only at their legal *situs*, their home port and the domicil of their owners. Hays *v.* Pacific Mail Steamship Co., 17 How. 596; St. Louis *v.* Ferry Co., 11 Wall. 423; Morgan *v.* Parham, 16 Wall. 471; Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196.

Between ships and vessels having their *situs* fixed by act of Congress, and their course over navigable waters, and touching land only incidentally and temporarily; and cars, or vehicles of any kind, having no *situs* so fixed, and traversing the land only, the distinction is obvious. As has been said by this court: "Commerce on land between the different States is so strikingly dissimilar, in many respects, from commerce on water that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the State and the Federal governments. No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable
waters of the earth are recognized public highways of trade
230 and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature. So that State interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land." Railroad Co. *v.* Maryland, 21 Wall. 456, 470.

In Gloucester Ferry Co. *v.* Pennsylvania, on which the plaintiff in error much relies, the New Jersey corporation taxed by the State of Pennsylvania, under one of the statutes now in question, had no property in Pennsylvania except a lease of a wharf at which its steamboats touched to land and receive passengers and freight carried across the Delaware River; and the difference in the facts of that case and of this, and in the rules applicable, was clearly indicated in the opinion of the court as follows: "It is true that the property of corporations engaged in foreign or interstate commerce, as well as the property of corporations engaged in other business, is subject to taxation, provided always it be within the jurisdiction of the State." 114 U. S. 206. "While it is conceded that the property in a State belonging to a foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a

domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void, as an interference with, and an obstruction of, the power of Congress in the regulation of such commerce. 114 U. S. 211.

231 Much reliance is also placed by the plaintiff in error upon the cases in which this court has decided that citizens or corporations of one State cannot be taxed by another State for a license or privilege to carry on interstate or foreign commerce within its limits. But in each of those cases the tax was not upon the property employed in the business, but upon the right to carry on the business at all, and was therefore held to impose a direct burden upon the commerce itself. Moran *v.* New Orleans, 112 U. S. 69, 74; Pickard *v.* Pullman's Southern Car Co., 117 U. S. 34, 43; Robbins *v.* Shelby Taxing District, 120 U. S. 489, 497; Leloup *v.* Mobile, 127 U. S., 640, 644. For the same reason, a tax upon the gross receipts derived from the transportation of passengers and goods between one State and other States or foreign nations has been held to be invalid. Fargo *v.* Michigan, 121 U. S. 230; Philadelphia & Southern Steamship Co. *v.* Pennsylvania, 122 U. S. 326.

The tax now in question is not a license tax or a privilege tax; it is not a tax on a business or occupation; it is not a tax on, or because of, the transportation, or the right — transit, of persons or property through the State to other States or countries. The tax is imposed equally on corporations doing business within the State, whether domestic or foreign, and whether engaged in interstate commerce or not. The tax on the capital of the corporation on account of its property within the State, is, in substance and effect, a tax on that property. Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S., 196, 209; Western Union Telegraph Co. *v.* Attorney General of Massachusetts, 125 U. S. 530, 552. This is not only admitted, but insisted on by the plaintiff in error.

The cars of this company within the State of Pennsylvania are employed in interstate commerce, but their being so em-
232 ployed does not exempt them from taxation by the State; and the State has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and fro upon certain routes of travel. If they had never passed beyond the limits of Pennsylvania, it could not be doubted that the State could tax them, like other property within its borders, notwithstanding they were employed in interstate commerce. The fact that, instead of stopping at the State boundary, they cross that boundary in going out and coming back, cannot affect the power of the State to levy a tax upon them. The State, having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicil, could tax the specific cars which at a given moment were within its borders. The route over which the cars travel ex-

tending beyond the limits of the State, particular cars may not remain within the State; but the company has at all times substantially the same number of cars within the State, and continuously and constantly uses there a portion of its property; and it is distinctly found, as a matter of fact, that the company continuously throughout the periods for which these taxes were levied, carried on business in Pennsylvania, and had about one hundred cars within the State.

The mode which the State of Pennsylvania adopted to ascertain the proportion of the company's property upon which it should be taxed in that State, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the State bore to the whole number of miles, in that and other States, over which its cars were run.

This was a just and equitable method of assessment; and,
233 if it were adopted by all of the States through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more.

The validity of this mode of apportioning such a tax is sustained by several decisions of this court, in cases which came up from the Circuit Courts of the United States, and in which, therefore, the jurisdiction of this court extended to the determination of the whole case, and was not limited, as upon writs of error, to the state courts, to questions under the Constitution and laws of the United States.

In the State Railroad Tax Cases, 92 U. S. 575, it was adjudged that a statute of Illinois, by which a tax on the entire taxable property of a railroad corporation, including its rolling stock, capital and franchise, was assessed by the state board of equalization, and was collected in each municipality in proportion to the length of the road within it, was lawful, and not in conflict with the Constitution of the State; and Mr. Justice Miller delivering judgment said:

"Another objection to the system of taxation by the State is, that the rolling stock, capital stock and franchise are personal property, and that this, with all other personal property, has a local *situs* at the principal place of business of the corporation, and can be taxed by no other county, city or town, but the one where it is so situated. This objection is based upon the general rule of law that personal property, as to its *situs*, follows the domicil of its owner. It may be doubted very reasonably whether such a rule can be applied to a railroad corporation as between the different localities embraced by its line of road. But, after all, the rule is merely the law of the State which recognizes it; and when it is called into operation
234 as to property located in one State, and owned by a resident of another, it is a rule of comity in the former State rather than an absolute principle in all cases. Green *v.* Van Buskirk, 5 Wall. 312; like all other laws of a State, it is therefore subject to legislative appeal, modification or limitation; and when the legislature of Illinois declared that it should not prevail in assessing personal property of railroad companies for taxation, it simply exercised an ordinary function of legislation." 92 U. S. 607, 608.

"It is further objected that the railroad track, capital stock and

franchise is not assessed in each county where it lies, according to its value there, but according to an aggregate value of the whole, on which each county, city and town collects taxes according to the length of the track within its limits." "It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised, than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole." "This court has expressly held in two cases, where the road of a corporation ran through different States, that a tax upon the income or franchise of the road was properly apportioned by taking the whole income or value of the franchise, and the length of the road within each State, as the basis of taxation. Delaware Railroad Tax, 18 Wall. 206; Erie Railroad *v.* Pennsylvania, 21 Wall. 492." 92 U. S. 608, 611.

So in Western Union Telegraph Co. *v.* Attorney General of Massachusetts, 125 U. S. 530, this court upheld the validity of a tax imposed by the State of Massachusetts upon the capital stock of a telegraph company, on account of property owned and used by it within the state, taking as the basis of assessment such proportion of the value of its capital stock as the length of its lines within the State bore to their entire length throughout the country.

235 Even more in point is the case of Mayre *v.* Baltimore & Ohio Railroad, 127 U. S. 117, in which the question was whether a railroad company incorporated by the State of Maryland, and no part of whose own railroad was within the State of Virginia, was taxable under general laws of Virginia upon rolling stock owned by the company, and employed upon connecting railroads leased by it in that State, yet not assigned permanently to those roads, but used interchangeably upon them and upon roads in other States, as the company's necessities required. It was held not to be so taxable, solely because the tax laws of Virginia appeared upon their face to be limited to railroad corporations of that State; and Mr. Justice Matthews, delivering the unanimous judgment of the court, said:

"It is not denied, as it cannot be, that the State of Virginia has rightful power to levy and collect a tax upon such property used and found within its territorial limits, as this property was used and found, if and whenever it may choose, by apt legislation, to exert its authority over the subject. It is quite true, as the *situs* of the Baltimore and Ohio Railroad Company is in the State of Maryland, that also, upon general principles, is the *situs* of all its personal property; but for purposes of taxation, as well as for other purposes, that *situs* may be fixed in whatever locality the property may be brought and used by its owner by the law of the place where it is found. If the Baltimore and Ohio Railroad Company is permitted by the State of Virginia to bring into its territory, and there habitually to use and employ a portion of its movable personal property, and the railroad company chooses so to do, it would certainly be competent and legitimate for the State to impose upon such property, thus used and employed, its fair share of the burdens

of taxation imposed upon similar property used in the like
236 way by its own citizens. And such a tax might be properly assessed and collected in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases the tax might be fixed by an appraisement and valuation of the average amount of the property thus habitually used, and collected by distraint upon any portion that might at any time be found. Of course, the lawlessness of a tax upon vehicles of transportation used by common carriers might have to be considered in particular instances with reference to its operation as a regulation of commerce among the States; but the mere fact that they were employed as vehicles of transportation in the interchange of interstate commerce would not render their taxation invalid." (127 U. S. 123, 124.)

For these reasons, and upon these authorities, the court is of opinion that the tax in question is constitutional and valid. The result of holding otherwise would be that, if all the States should concur in abandoning the legal fiction that personal property has its *situs* at the owner's domicil, and in adopting the system of taxing it at the place at which it is used and by whose laws it is protected, property employed in any business requiring continuous and constant movement from one State to another would escape taxation altogether.

Judgment affirmed.

Mr. Justice Bradley, with whom concurred Mr. Justice Field and Mr. Justice Harlan, dissenting.

(Dissenting opinion omitted.)

Mr. Justice Brown, not having been a member of the court when this case was argued, took no part in its decision.

237 "EXHIBIT F" FOR IDENTIFICATION.

145 PENNSYLVANIA STATE, 96.

THE COMMONWEALTH
vs.
D., L. & W. R. R. Co.

Appeal by the Commonwealth from the Court of Common Pleas of Dauphin County.

Argued June 3, 1891; Decided June 12, 1891.

1. The capital stock of a domestic railroad corporation represented by its equipment in use interchangeably on its lines within and without the state is taxable under section four act of June 7, 1879, P. L. 114, and section 21 act of June 1, 1889, P. L. 429, in the proportion *of* its mileage operated in this state bears to its entire mileage. Pullman's Palace Car Co. *vs.* Commonwealth, 107, Pa. 156.

2. But the capital of such company invested in real estate and other railroads outside of the state, and in vessels, barges and tugs built, registered and used wholly outside the state is not subject to such taxation; the said property being already chargeable in the states where it exists and is used; Commonwealth *v.* Dredging Co., 122 Pa., 386, distinguished.

Before Paxson, *C. J.*, Sterrett, Green, Clark, Williams, McCollom and Mitchell, *JJ.*

No. 49, May Term, 1891, Sup. Ct. Court below No. 248, January Term, 1891, C. P.

On November 11, 1890, under an account stated by the auditor general and state treasurer against the Delaware, Lackawanna & Western Railroad Co. for tax on capital stock under section 4, act of June 7, 1879, P. L. 114, and section 21, act of June 1, 1889, P. L. 429, for the year ending the first Monday of November, 1889, the company filed an appeal and specifications of objections.

On May 9, 1890, the cause having been heard on sub-
238 mission to the court without a jury, under the act of April 22, 1874, P. L. 109, the court, Simonton, *P. J.*, filed the following decision:

Findings of Fact.

1. This is an appeal from a settlement made by the auditor general and state treasurer on the 10th day of September, 1890, against the defendant for tax on capital stock for the year ending the first Monday of November, 1889, based upon a report made by defendant's secretary and treasurer as required by law. In said settlement defendant is charged with tax upon the whole amount of its capital stock of $26,200,000, amounting to $91,700. Defendant has paid $76,700 of said tax and has appealed from the remainder of said tax on the ground that it is levied on property outside of the taxing jurisdiction of the state of Pennsylvania, and that therefore the state has no right to tax said property and that the settlement is therefore invalid and unconstitutional.

2. We find the facts with reference to the situation and location of the property of defendant represented by its capital stock to be as follows:

The general office of the company is at No. 26 Exchange Place in the City of New York. Its capital stock is $26,200,000, and during the year ending as aforesaid there were declared and paid upon the said capital stock four dividends of 1¾ per centum each upon the 20th days of January, April, July and October respectively, making a total of 7 per centum for the year.

The main line of railroad owned by said company in Pennsylvania extends from the Pennsylvania and New York State line near Great Bend Village to the centre of a railroad bridge across
the Delaware river near Delaware Station, originally con-
239 structed jointly by the D., L. & W. R. R. Co., and the Warren Railroad Co., a corporation of New Jersey. The said main

line of railroad in Pennsylvania is 114.61 miles in length. In addition thereto the company owns branch railroads in Pennsylvania as follows:

Lackawanna & Bloomsburg Branch, from Scranton to Northumberland, 80 miles.

Winton Branch, from Nay Aug to Winton, 7.50 miles.

Keyser Valley Branch, from Junction with main line to Keyser Valley, 6.43 miles.

Storr's Branch, from Storr's Junction to Storr's Mine, 2.80 miles.

The defendant also operates and has therein such interest as was conveyed by the agreement, a copy of which is hereto annexed and marked Exhibit A and made part of this finding, a railroad known as the Warren Railroad, extending from the center of the railroad bridge across the Delaware river hereinbefore mentioned to a point known as the Junction in the State of New Jersey, the said road being 18.80 miles in length, all in the state of New Jersey.

The Warren Railroad Co. from which the said Warren Railroad was acquired never owned any equipment, but the said road has been at all times and still is operated by the equipment furnished by the D. L. & W. R. R. Co. It is operated as part of the main line of the D. L. & W. R. R.

In addition to the railroads above mentioned the D. L. & W. R. R. Co. does now and did in 1889 operate under lease for the various terms of years the following railroads:

(Here followed a list of railroad lines, long and short, the greater number lying outside the state.)

The total miles of railroad owned, leased or controlled and operated by the D. L. & W. R. R. Co. is 891.41, of which 217.15
240 miles are in Pennsylvania, and 673.66 in New York and New Jersey. The total equipment owned by the D. L. & W. R. R. Co. was inventoried December 31, 1889, at $8,134,823. This equipment was used upon the entire system interchangeably with the equipment of such of the leased and controlled roads mentioned as possessed their own equipment; that is to say the leased equipment of roads in other states was used in Pennsylvania, and that owned by the D. L. & W. R. R. Co. was used in other states. It is difficult to determine precisely what should be considered the equipment of the roads in Pennsylvania and what the equipment of the roads outside of Pennsylvania. But we believe it would be fair to divide the aforesaid valuation of equipment owned by the company as follows, viz.:

Value of equipment for operation of roads in Pennsylvania	$5,075,342
Valuation of equipment owned by D. L. & W. R. R. Co. used on its road outside of Pennsylvania	3,059,481

The D. L. & W. R. R. Co. owns real estate outside of Pennsylvania located and valued as follows, viz:

Binghamton, N. Y.	$23,905.52
Buffalo, N. Y.	304,790.28
New York City	201,418.48
Rochester, N. Y.	23,185.03
Chicago, Ill	51,740.60
Staten Island, N. Y.	1,609.35
Utica, N. Y.	50,388.05
Ore Lands in New Jersey	40,120.11
Syracuse, N. Y.	20,083.86

It also owns vessels, barges and tugs built, registered and used wholly outside of Pennsylvania of the value of $156,526.17.

241 3. The road owned by the D., L. & W. R. R. Co. in Pennsylvania was built primarily for the purpose of transporting to markets outside of the state the products of anthracite coal lands in said state; and the principal business of the railroads owned or leased and operated by said company in Pennsylvania does now and did in the year 1889 consist chiefly of the transportation of freight and passengers by continuous carriage upon a single way bill or ticket from points in Pennsylvania to points in other states, or from points in other states to points in Pennsylvania, or from points in another state passing through Pennsylvania to points in other states. The transportation upon said roads in Pennsylvania of freight and passengers local to Pennsylvania, that is to say between points both of which are within said state, did not in the year 1889 exceed say 19 per centum of the entire transportation business conducted upon said roads.

The ownership, interest or estate of the D., L. & W. R. R. Co. in the Warren Railroad Company is and was in the year 1889 of a fair cash value of not less than $1,000,000. In this estimate we do not include the equipment of the Warren Railroad, which is owned by the D., L. & W. R. R. Co.

An analysis of the facts shows that the total miles of railroad owned, leased or controlled and operated by defendant in the states of Pennsylvania, New Jersey and New York, amounting to 2,891.41 miles there are in Pennsylvania 217.75 miles and outside of Pennsylvania 673.66 miles; and that defendant owns the equipment of 147.31 miles of the roads outside of Pennsylvania, the remaining 526.35 miles of road being equipped by the several corporations from which the defendant has leased said roads or which are controlled by it by reason of its ownership of stock therein.

242 As it does not appear from the evidence or findings of fact that the defendant has any of its property represented by its capital stock invested in these 526.35 miles of road we think they cannot be included in any computation of the proportion of the capital stock not taxable by the state of Pennsylvania. After excluding these we have a proportion of 217.75 miles in Pennsylvania and 147.31 miles outside of Pennsylvania upon which the equipment is owned by the defendant and is used interchangeably. The total value of the equipment owned by it we have found to be $8,134,823, and therefore the proportion of defendant's capital stock

represented by this sum is taxable only in the proportion thus indicated. It is true that the findings of fact show that the equipment owned by the other roads leased or controlled by the defendant is used interchangeably upon the roads of said companies and defendant's own road in Pennsylvania, but we think this furnishes no ground for including the mileage of said roads in the apportionment; for, if this were done, we must necessarily also have the value of their equipment, which is not given, and it is fair to assume that if their equipment was not used in Pennsylvania there would be a correspondingly larger proportion of the equipment owned by the defendant in this state.

The findings of fact show that the value of the leasehold interest held by defendant in the Warren Railroad is $1,000,000. This excludes the idea that any large proportion of capital stock of defendant is represented by said leasehold interest or is invested in said road, and therefore the only exemption which can be conferred upon defendant's capital stock is the exemption of $1,000,000 of its capital stock. In arriving at these proportions we assume
243 the value of assets to be the same as the par of the capital stock, the tax being levied on the basis of the amount of dividends declared and not upon the appraisement.

The legal questions here involved are practically the same as some of those which were considered in the case of the Commonwealth *v.* Pennsylvania Co., June Term, 1889, of Dauphin County Common Pleas, and for the reason there given, which we need not here repeat, we think that the amount of the capital stock of the defendant represented by the value of its equipment should be apportioned for the tax according to the proportions 217.75 taxable and 147.31 miles not taxable, and that the amount of its capital which represents the value of its interest in the lease of the Warren Railroad, as well as the amount which represents its investment in real estate outside of the state of Pennsylvania, and the amount which represents its investment in vessels, barges and tugs built, registered and used wholly outside of Pennsylvania, are exempt from taxation by the state of Pennsylvania.

We embody these results in the following

Conclusions of Law.

1. Defendant is not liable to taxation by the state of Pennsylvania on so much of its capital stock as is represented by the value of its leasehold interest in the Warren Railroad; and the settlement hereby appealed from so far as it taxes said investment is erroneous and illegal.

2. Defendant is liable to taxation by the state of Pennsylvania only on $\frac{174.31}{365.06}$ parts of the whole amount of its capital stock invested in equipment, this being the proportion which the number of miles operated and equipped by it in the state of Pennsylvania bears to the whole number of miles operated and equipped by it;
244 and the settlement appealed from so far as it taxes any greater amount of capital so invested is erroneous and illegal.

3. Defendant is not liable to taxation by the state of Pennsylvania on so much of its capital stock as is represented by the value of the real estate owned by it outside of Pennsylvania; and the settlement appealed from so far as it taxes said amount is erroneous and illegal.

4. Defendant is not liable to taxation by the state of Pennsylvania on so much of its capital stock as is represented by the value of its vessels, barges and tugs owned by defendant which were built and are registered and used wholly outside of the state of Pennsylvania; and the settlement appealed from so far as it taxes said investment is erroneous and illegal.

5. Defendant having paid to the treasurer of the state of Pennsylvania the whole amount of tax legally due of the settlement appealed from, judgment is directed to be entered in favor of the defendant, if exceptions be not filed within the time limited by law.

To the foregoing decision both parties filed exceptions.

Said exceptions being argued, one of them filed by the Commonwealth was sustained by the following additional finding:

The company defendant is a domestic corporation, having been duly chartered by the act of March 11, 1853, P. L. 163, which act, together with the acts therein referred to, and the supplements thereto, is made a part of this finding of fact.

The other exceptions being overruled and judgment entered in accordance with the decision filed, the Commonwealth took
245 this appeal, specifying that the court erred

1, 2, in the first and second conclusions of law.

3, in not holding that the whole of defendant's capital stock invested in equipment was taxable in Pennsylvania.

4, in not holding that the whole of defendant's capital stock invested in leasehold interests was taxable in Pennsylvania.

5, 6, in directing judgment to be entered in favor of the defendant, and in not directing judgment to be entered in favor of the plaintiff for the amount claimed.

Mr. W. U. Hensell, Attorney General, and Mr. Jas. A. Stranahan, Deputy Attorney General for the commonwealth.

Counsel cited generally: Commonwealth *v.* Standard Oil Co., 101 Pa. 119; Pennsylvania *v.* Trenton Bridge Co., 9 Am. L. Reg. N. S. 298; Commonwealth *v.* Railroad Co., 29 Pa. 370; Commonwealth *v.* Railroad Co., 2 Pears. 391; Pittsb. etc. Ry. Co. *v.* Commonwealth, 66 Pa. 73; Pennsylvania Co. *v.* Commonwealth, 22 W. N. 340; Pullman's Palace Car Co. *v.* Commonwealth, 107 Pa. 156.

As to the taxation of the equipment of a domestic corporation:

Commonwealth *v.* Dredging Co., 122 Pa. 386; Pacific R. Co. *v.* Cass Co., 53 Mo. 17; Orange R. Co. *v.* Alexandria, 17 Gratt. 176; Hays *v.* Steamship Co., 17 How. 596; St. Louis *v.* Wiggins Ferry Co., 7 Wall. 423; Sangamon, etc., R. Co. *v.* Morgan Co., 14 Ill. 163, 56 Am. Dec. 497; Welkey *v.* Pekin, 19 Ill. 160; Ontario Bank *v.* Bunnell, 10 Wend. 187; Burroughs on Taxation, 186; Cooley on Taxation, 273; Balt. & O. R. Co. *v.* Allen, 17 Am. & Eng. R. Cas. 464.

246 As to its leasehold interest:

State *v.* Railroad Co. (44 Conn. ?), 7 Am. & Eng. R. Cas.

238; Archer *v.* Railroad Co., 102 Ill. 493 (7 Am. & Eng. R. Cas. 249);

Mr. M. E. Olmsted for the Appellee.

Distinguish Commonwealth *v.* Dredging Co., 122 Pa. 386, counsel cited:

Pullman's Palace Car Co. *v.* Commonwealth, 107 Pa. 156; Pullman's Palace Car Co. *v.* Twombley, 29 Fed. R. 658.

As to defendant's interests in the Warren Railroad:

Commonwealth *v.* Standard Oil Co., 101 Pa. 119; Commonwealth *v.* Dredging Co., 122 Pa. 386; Caldwell *v.* Fulton, 31 Pa. 475; Delaware, etc., R. Co. *v.* Sanderson, 109 Pa. 583; Cincinnati College *v.* Yeatman, 30 Ohio St. 276.

Per Curiam: We are unable to see that the ruling of the court below is in conflict with Commonwealth *vs.* Standard Oil Co., 101 Pa. 119. That company is a foreign corporation, and it was held that it was not the intention of our taxing acts to tax the whole capital stock of such corporations doing business within this Commonwealth irrespective of the place of its investment, but to tax the property of such company, that is to say its capital stock, to the extent that it brings such property within the state in the transaction of its business. This is the only equitable rule which will secure to the Commonwealth its fair proportion of tax and yet enable such corporations to carry on their legitimate business. For, if a corporation having its *situs* in one state and transacting business in every other state of this country can be taxed in each state to the full amount of its capital stock, the result is confiscation.

The defendant here is a domestic corporation, and it was
247 contended that its capital invested in equipment used interchangeably on its main line in this state, and its leased lines in other states, is not exempt from taxation in this state. The court below held otherwise, and from this decision the Commonwealth has appealed.

It is true that the *situs* of a domestic corporation is in this state, and that for many purposes the domicil of the person, whether natural or artificial, draws to it the personal property belonging to such owner. That this is so as to such intangible property as is not the subject of taxation elsewhere, such as money at interest, may be conceded; but for the purposes of taxation tangible personal property has a *situs* wherever it may be found. Hence it was held in Pullman's Palace Car Co. *vs.* Commonwealth, 107 Pa. 156, the said company being a foreign corporation, that the proportion of the capital stock of the company invested and used in Pennsylvania is taxable here, and that the amount of the tax may be properly ascertained by taking as a basis the proportion which the number of miles operated by the company in this state bears to the whole number of miles operated by it, without regard to the question where any particular car or cars are used, this court saying in its opinion:

"They (the cars) are operated within this state. They are daily passing from one state to the other. They are used in performing the functions for which the corporation was created. The fact that they

are also used and operated in other states cannot wholly exempt them from taxation here."

This case has recently been affirmed by the Supreme Court of the United States, although the report of the case has not yet reached us. On the other hand, we held in Commonwealth *v.* Dredging Co., 122 Pa. 386, that the dredges which were the subjects of the con-
248 troversy were taxable at the *situs* of the company for the reason that although wholly used outside of the Commonwealth they did not remain at any one place long enough to render them liable to taxation there, this court saying in its opinion:

"From the nature of the business it is in one place to-day and in another to-morrow, and hence not taxable in the jurisdiction where temporarily employed. It follows that if not taxable here it escapes altogether."

It may be that in the case of a domestic corporation the Commonwealth would have the power to tax its entire capital stock, no matter where found or how invested, and notwithstanding that the whole or the greater portion of its stock only was invested in tangible property located and used in other states and liable to taxation by the laws of those states. But the Commonwealth is not a bandit with a pistol at the throat of every property owner. On the contrary, she imposes no greater burdens than the necessities of the state require; and she endeavors at least to impose those burdens in as equitable a manner as the wisdom of the legislature and the difficulties of the subject admit.

We do not think it was error for the learned court below to hold that the defendant was not liable to taxation by this state on its interest in the Warren Railroad. That road is wholly outside of the state; and whatever the defendant's interest therein may be, it is liable to taxation by the state of New Jersey. We think it comes within the principles above indicated.

Judgment affirmed.

249 American and English Railroad Cases (New Series), Volume 14, page- 145-174 (188 Penna., 169).

Commonwealth
v.
New York, P. & O. R. Co.

(Supreme Court of Pennsylvania, Oct. 17, 1898.)

Taxation—Capital Stock.—Within the meaning of the act of 1891 of Pennsylvania, providing for the taxation of "all the property of corporations * * * having capital stock, at the rate of five mills on each dollar of its actual value," a tax on the capital stock is a tax on the property and assets, including the corporate franchises.

Same—Same—Deduction of Indebtedness.—Under such statute the question of the actual value in cash of the capital stock is a question of fact, which must be determined by considering the value of the corporate property, and assets of every kind, including its bonds

and mortgages, and moneys at interest, and its franchises and privileges, and the amount of the incumbrances on its property and franchises is also a relevant fact to be considered, but the corporate indebtedness, though it should be considered, is not to be specifically deducted from the valuation so ascertained and determined.

* * * * * * *

FINDINGS—PRESUMPTIONS.—Defendant's counsel having made no request for a specific finding as to what extent the value of its capital stock was effected by its indebtedness, it will be assumed that such element was properly considered.

VALUE OF CAPITAL STOCK—DISCRIMINATION.—Under such statute, the actual value of capital stock being a pure question of fact, a corporation cannot complain of discrimination in the method
250 adopted to ascertain such value so long as its stock is not assessed in excess of such value.

Appeal by the company from Dauphin county court of common pleas. *Affirmed.*

The findings of fact and opinion of the court below are as follows:

This is an appeal from a settlement made by the auditor general and state treasurer against the corporation defendant June 30, 1896, for tax on capital stock for the tax year 1895. It was tried by the court without a jury, as provided by the act of April 22, 1874, and, on the testimony and documentary evidence, we find the following facts:

"(1) Defendant is a corporation chartered under the laws of the states of New York, Pennsylvania and Ohio, owning a line of railroad extending from Salamanca, New York, across the northwestern part of the state of Pennsylvania, to Dayton, Ohio, a distance of 388.04 miles. Of this line, 92.4 miles are within the state of Pennsylvania, and the remainder in either New York or Ohio. Defendant also owns a line of railroad 33.78 miles in length, known as the 'Franklin Branch,' extending from Buchanan to Oil City, all in Pennsylvania. It also owns a branch 7.7 miles in length in Ohio; making the total mileage owned by it 429.52 miles. It is also lessee of 168.09 miles of road, of which 34.54 miles are in Pennsylvania, and the remainder in Ohio. It connects at Salamanca, its eastern terminus, with the railroad of the New York, Lake Erie and Western Railroad Company, and by a connection at Dayton, Ohio, its western terminus, it forms, by means of leases and trackage contracts, part of the through line of the last named road from the city of New York to the cities of Cincinnati and Chicago.

"(2) Defendant's capital was, in 1895, $44,999,350, divided into 899,987 shares, of the par value of $50 each; 200,000 shares,
251 or $10,000,000, being preferred stock, and 699,987 shares, or $34,999,350, common stock. The cost of defendant's road and equipment was $170,987,519.58. No dividends were ever paid on either the preferred or common stock.

"(3) In 1895 defendant's indebtedness amounted to $129,853,080.72, as follows: Prior lien bonds, $8,000,000; first-mortgage bonds, $44,337,000; deferred warrants converted into first mortgage bonds, representing unpaid interest on $27,640,345.75; second mort-

gage bonds, $14,500,000; third mortgage bonds, $30,000,000; car trust agreements, subject to which the company held its active rolling stock, $1,950,900, and a small unsecured balance. Defendant has not for many years earned or paid any interest on its second or third mortgage bonds, and no interest was paid in 1895, on its first mortgage bonds, though some was earned. The interest on the $8,000,000 prior lien bonds was paid. Nearly all defendant's indebtedness is due to citizens or corporations of other states and countries than Pennsylvania.

"(4) In April, 1883, it leased its line and road to the New York, Lake Erie & Western Railroad Company, for ninety-nine years, the terms of the lease requiring the lessee to pay to defendant thirty-two per cent. of the gross receipts derived from the operation of the road. The gross receipts in the tax year 1895 amounted to $6,332,317.52, and the proportion due to defendant was $2,062,000. In 1893 the lessee became insolvent, and passed into the hands of receivers appointed by the circuit court of the Southern district of New York; and by virtue of an agreement not clearly explained in the evidence,
and of a decree of that court, the receivers were ordered to pay
252 to the defendant, instead of the agreed rental, only the net
earnings received from the operation of its road, not less, however, than $1,500,000; and defendant, during the tax year 1895, actually received as rental only $1,411,573.96, and it had during that time receipts from other sources amounting to $52,029.49. During its fiscal year ending June 30th, 1895, its gross income from all sources was $2,042,307.15, and during 1895 there were expended upon its road, in betterments, $2,931,686.31. From what source the amount thus expended was derived is not definitely shown by the evidence.

"(5) During the months of April, May and June of 1895, 4,200 shares of the preferred stock of the defendant were sold, in the city of New York, at prices ranging from 62½ to 87½ cents per share, the average price being 75 cents. There were no shares of common stock sold during the tax year 1895.

"(6) An order of sale of defendant's road was granted in January, 1896, at the suit of the holders of the bonds secured by the first mortgage on its road and franchises; and, in pursuance of this order, all of its property, leasehold and otherwise, including defendant's franchises, was on the 26th of February, 1896, sold at public auction, at the court house in Akron, Ohio, for the sum of $10,000,000, subject to the prior lien mortgage of $8,000,000; and the proceeds of the sale were appropriated towards the payment of the first mortgage bonds, the holders of subsequent liens receiving nothing.

"(7) On February 21, 1896, the secretary and treasurer of the defendant company, after having taken the oath prescribed by the act of June, 1891, made the report to the auditor general required by
said act, and appraised the capital stock of said corporation as
253 of no value whatever. The auditor general and state treasurer
being dissatisfied with the appraisement and valuation so made and returned, value- and appraised the capital stock of defendant for the tax year 1895 at $34,480,577.70, stating at length in their

appraisement their reason for so doing, and settled an account in accordance with said appraisement, charging defendant with a tax at the rate of five mills, amounting to $172,402.88, from which settlement defendant appealed to this court; and, on the trial, the report and appraisement made by the defendant's officers, the appraisement and settlement made by the auditor general and state treasurer, defendant's specifications of objections to the settlement, and other evidence, oral and documentary, was offered and heard.

"(8.) After a full consideration of all the relevant evidence in the case, we find that the appraisement made by the defendant's officers is not correct, and that the appraisement made by the auditor general and state treasurer is excessive; and we further find that the actual value in cash of defendant's capital stock, representing its tangible property and its franchises between the 1st and 15th of November, 1895, was $15,000,000, and that defendant is taxable for the tax year 1895, at the rate of five mills on 126.18—510.20 of said fifteen millions, that being the proportion of defendant's capital stock which represents the proportion of its road, property, assets, franchises and privileges in Pennsylvania, calculated on the mileage basis.

"*Discussion.*

"In Com. *v.* Standard Oil Co., 101 Pa. St., 119, Mr. Justice Paxson, delivering the opinion of the court, said: 'It has been re-
254 peatedly decided, and is settled law, that a tax upon the capital stock of a company is a tax upon its property and assets,'—citing a number of cases in this state, and many from other states. In Appeal of Fox, 112 Pa. St. 337, 4 Atl. 149, it was held that the mortgages owned by corporations are taxed through the tax on capital stock in substantially the same manner as the mortgages belonging to individuals are taxed by the act of 1885, which requires them to report to the assessors and pay a tax upon the par value of their mortgages, and that, if corporations were required to report and pay tax under that act of 1885, the result would be double taxation. Speaking in this case of capital stock in itself considered, Justice Paxson says: 'The capital stock is nothing, a myth; a mere name, excepting in so far as it is represented by investments made with the money paid into the treasury of the corporation on account of such capital stock. Hence it is that the courts have long since declared that a tax upon the capital stock of a corporation is a tax upon the assets and property of such corporation.' The opinion of the court below in Com. *v.* Western Land & Imp. Co., 156 Pa. St. 455, 26 Atl., 1034, contains a history of this tax, and shows that it has always been assessed on the basis of the rate per cent. of dividends when the dividends during the tax year equalled or exceeded six per cent., and, when no dividend was made, on an appraisement of the capital stock; and when the dividend was less than six per cent., under some of the acts, the tax was assessed on the basis of the rate per cent. of the dividend and, under others, on the assessed value of the capital stock. That case decides that, when the tax is measured by the rate per cent. of the dividend, that is the only test; and some of the cases

there cited illustrate this very forcibly, and show that the
255 value indicated by the rate per cent. is sometimes very different from the actual value. Thus, in Atlantic & Ohio Tel. Co. *vs.* Com., 66 Pa. St. 57, where the report of the officers of the corporation stated that a dividend of ten per cent. had been made, it was held that the dividend reported furnished the measure of the tax, although the corporation proved that it has in reality been paid upon a part only of the stock. And in Columbia Conduit Co. *vs.* Com., 99 Pa. St. 307, where, after declaring dividends amounting to $200,000, a loss by fire occurred to which nearly one-half of the declared dividend was applied, instead of being paid to the stockholders, the whole dividend was, nevertheless, held to furnish the measure of the tax. And in Maston's Ford Bridge Co. *v.* Com., 117 Pa. St. 265, 11 Atl. 813, where all the property of a corporation with a capital of the par value of $45,000 was converted into money, and amounted to $75,000, the excess of $30,000 above the par value of the capital stock was held to be a dividend, and the company was assessed thereon with a tax of one-half mill on each one per cent. amounting to $1,500, which would be a three-mill tax upon $500,000. And in Com. *v.* Fall Brook Coal Co., 156 Pa. St. 488, 26 Atl. 1071, it was decided that a tax on the capital stock of the Fall Brook Railway Company was a tax on $3,500,000, which the Fall Brook Coal Company held invested in the shares of the railway company, and that to tax that amount of the capital stock of the coal company after the railway company had paid the tax on its capital stock would be double taxation.

"It thus appears that under the acts taxing capital stock, as they stood prior and up to 1891, the amount of dividend declared during the tax year was the only test of the amount of the tax, and that this had no necessary relation to the actual value of the capital
256 stock of the corporation. When the dividends did not amount to the rate which by the taxing acts was made the measure of the tax, the capital stock of the company was required to be appraised, and a tax at the rate of originally three mills afterwards five, was assessed upon its appraised value. This appraisement, it is true, was formally of the capital stock, and not of the property of the corporation; and the data required to be furnished to the auditor general, by the terms of the acts, to enable him to judge of the correctness of the appraisement, related to the operations of the company during the year, the amount of its capital stock, and the value of its shares, more directly than to the quantity, quality, and value of its assets and property. The inference sought to be drawn from this by the learned counsel for defendant is that, as the value of the shares would be affected by the amount of indebtedness and incumbrances upon the property of the corporation, the practical result was that the tax, so far as it was a tax upon the property of the company, was a tax only on the value of its property, less the amount of its indebtedness and incumbrances; but it must be remembered that this basis of assessment was adopted in 1844, when the corporations to which it applied were mainly banks and other moneyed institutions which did not have incumbrances, and

whose indebtedness was mainly for deposits that were a source of profit to the corporations.

The subjects of the tax are said in the act of 1844 (P. L. 486) to be 'all banks, institutions and companies.' An appraisement of the shares of such corporations at not less than the price at which they sold in the market would furnish a fairly accurate measure of the value of the assets and property of the company. That
257 by 'institutions,' in the act of 1844, the legislature intended moneyed corporations, is shown by the act of April 16, 1845 (P. L. 507), where the subjects of the tax on capital stock imposed by the act of 1844 are styled 'banks and savings institutions.' And in the capital stock act of 1859 (P. L. 529) the subjects of the tax are styled 'banks, savings institutions and companies whatsoever.' It was not until after the passage of the act of February 23, 1866 (P. L. 82), that banks ceased to be the principal corporations subject to the tax on capital stock. By the act of May 1, 1868 (P. L. 108), the amount of the dividend declared by the corporation was made the measure of the tax on its capital stock in every case where any dividend was made, and it was only in cases where no dividend whatever was made that the officers of the corporation were required 'to estimate and appraise the capital stock of such companies at its actual value in cash.' This act contains no suggestion that the appraised value should be the value of the property and assets of the corporation less its indebtedness. The act of April 24, 1874 (P. L. 68), which superseded the act of May 1, 1868, was practically identical with it on this subject, except that the officers of the corporation were required to estimate and appraise the capital stock of such companies upon which no dividend had been made or declared, at its value, not less than the average price which said stock sold for during said year;' and that it also contained the proviso 'that if the auditor general or state treasurer, or either of them, is not satisfied with the valuation so made and returned, they are hereby authorized and empowered to make a valuation thereof, and to settle an account upon the valuation so made for the taxes, penalties and interest due the commonwealth.' This proviso contains at least an implica-
258 tion that, even if the appraisement were not less than the average selling price, it might be too low, and no restriction was put upon the accounting officers in making the appraisement, nor did the act require them to deduct incumbrances. The act of June 7, 1879, required the capital stock to be appraised when no dividend or dividends less than six per cent. had been declared during the year and contained a further limitation of minimum value in the appraisement, by requiring not only that it should be 'not less than the average price which said stock sold for during said year,' but also that it must be not less than the average price or value as indicated or measured by the amount of dividends made or declared.' Under this act occurred the case of Hamilton Steeled Wheel Co. v. Com. 12 Wkly. Notes cas. 328, where $1,000,000, the whole capital of the corporation, had been invested in patent rights which would soon expire, and the officers of the company appraised the capital stock for the year 1879 at $110,000, and for the year 1880 at

$100,000, on the theory that as the patent had only two years to run, and the whole value of the capital stock was invested in the patent, the stock was not worth more than that amount. The company, however, had made a dividend of four per cent., which, in the judgment of the accounting officers, indicated a value of at least $500,000, and they therefore assessed it at that amount. The court below decided that under the circumstances the value of the capital stock 'must be as measured and indicated by the amount of dividends made and declared. However unjustly it might operate in particular cases, there can be no doubt of its meaning and the manner of valuing which it indicates and points out.' On appeal to the Supreme Court, this ruling was affirmed, on the opinion of
259 the learned judge of the court below, President Judge Pearson. The next act in order was the act of 1889, which contained the same minimum limitation of value as the act of 1879.

"We thus find that, under all the acts taxing capital stock, the amount of tax was either fixed by the rate per cent. of the dividends (in which case that was the sole measure of the tax, regardless of the actual value of the property and assets of the corporation), or it was imposed on the appraised value of the stock, subject to the limitation in the earlier acts, that the amount of the appraisement should not be less than the value indicated by the selling price of the stock (which would fairly indicate its value when the subjects of the tax were banks and institutions of that nature), and afterwards by the limitation that it should not be less than the value indicated by the amount of dividends or profits made. The nature of the test of value was in all cases an inquiry into the result of the activity of the corporations for the tax year, and an inference of value from these results, rather than a direct estimate of the value of the tangible property and assets of the corporation. There was, we think, ample reason for this. The value of the property and assets of a railroad corporation, for instance, cannot be ascertained by appraising its buildings, rails, bridges, cars, etc. It is all these in operation—their use as a railroad, with the franchise or right to use them, and to charge fares and freight for so doing—that really constitute the property and assets of the corporation; and this is what is represented by its capital stock. There has been, however, a large class of cases in which it became necessary to have a more direct reference to the tangible property and assets of the corporation in making the appraisement. This was so in all cases where, by the terms of the taxing act, or because of the nature or *situs* of the property
260 of the corporation, some of it was subject to taxation, and some exempt. Thus, the capital stock of manufacturing corporations has been since 1885 exempt from taxation; but as this exemption was held to apply only to the proportion of the capital stock that represented property actually used in the business of manufacturing, while property not so used was held taxable, it became necessary to ascertain the value of the property in order to determine the proportion of the capital stock taxable and exempt. And when corporations, whose capital stock was subject to the tax, owned property which could not be taxed because of its nature,—as,

for instance, patent rights or United States bonds,—or because it was located out of the state, it became necessary to ascertain the actual value of the property. Com. *v.* Westinghouse Air Brake Co., 151 Pa. St. 276, 24 Atl. 1111, 1113; Com. *v.* Westinghouse Electric & Mfg. Co., 151 Pa. St. 265, 24 Atl. 1107, 1111; Com. *v.* Juniata Coke Co., 157 Pa. St. 507, 27 Atl. 373; Com. *v.* Pennsylvania Coal Co., 5 Co. Ct. R. 89, and Com. *v.* MontgomeryLead and Zinc Min. Co., *Id.* 91,—are cases of this kind, as is also Com. *v.* Standard Oil Co., 101 Pa. St. 119.

"Another like case is Com. *v.* Pennsylvania Co., 145 Pa. St. 274, 23 Atl. 549, to which the learned attorney general has referred. This case was elaborately argued and considered in the court below, where it was conceded that if the corporation was taxable at all, which was denied, the tax was upon its property and assets, and that the value and nature and *situs* of these must be ascertained in order to determine the amount of the tax, and the date from which these could be ascertained was furnished by the defendant. The
261 court below decided that the defendant was taxable on the amount of its capital stock represented by investments in real estate in Pennsylvania, personal property in Pennsylvania stocks of foreign corporations, bonds of foreign corporations, and bonds of domestic corporations, and on the proportion of its capital stock represented by investments in equipment or rolling stock which was found to be within the state, by apportioning the whole amount invested in equipment on the basis of its mileage within and without the state, as shown by the facts and exhibits. The case was appealed to the supreme court, and error was there assigned to these rulings, and to these only; and the case was argued on the questions thus raised, but none of these questions were decided by the supreme court. The only point decided was, as stated at the close of the opinion (145 Pa. St. 283, 23 Atl. 552), 'that after the lapse of a year from the time of payment of the taxes of a current year, without any request for the restatement of the account of the taxpayer, the account is closed, except as to clerical mistakes, and can only be reopened by an order of the board of revision.' This was an application of the provisions of section 16 of the act of March 30, 1811, relative to public accounts (which had been applied by the court below to the settlements for 1872 and 1873, because for those years the accounts were resettlements), to the settlements for the subsequent years, which were original settlements, and not resettlements. That this was done under a misapprehension of the facts is manifest. The learned justice who wrote the opinion evidently supposed that all the state taxes to which a corporation is subject for a given year are settled and included in one account, and did not know that it is, and always has been, the uniform practice of the accounting
262 department to require reports and settle accounts separately for each kind of tax to which a corporation is subject, and that a settlement for one kind of tax does not imply any consideration or determination of its liability or otherwise for tax of a different kind. An account or settlement is a physical, tangible thing,—a paper with figures and writing upon it, signed by the auditor general

and state treasurer, indorsed, copied into a ledger, and filed away in its appropriate place. Whether such a settlement has been made against a given corporation, for a tax of a given year, is therefore a question of fact, to be ascertained by looking in the proper place for the settlement. Such inspection showed at the time this case was tried, and it would now show, that there had never been any settlement made against the Pennsylvania Company for the years from 1874 to 1887, inclusive, for tax on capital stock; and the court below found this as one of the facts in the case. The settlements then in question for those years were therefore original settlements, and not resettlements, as was supposed, while those for 1872 and 1873 were resettlements; and this is the reason why the court below held the latter invalid, and those for the subsequent years valid. It was not claimed by the counsel for defendant, who are experts in tax cases, that the settlements for the years subsequent to 1873 were resettlements; and therefore the ruling of the court below on this subject was not assigned for error, and hence the supreme court were not assisted by the argument of counsel in coming to the conclusion reached by them which probably accounts for the misapprehension. The result is that we are without a decision of the court of last resort on the question decided in the court below, and discussed in the supreme court. The case is, however, valuable, as it shows that
263 it was conceded and understood, both by the counsel and the court, that the tax in question was the tax upon the property of the corporation, the value of which it was necessary to appraise, and that the only controversy—if the corporation was taxable—was as to the method of apportionment and that it was not even suggested by the learned counsel that the indebtedness of the corporation should be deducted in order to ascertain the value.

"We have now reviewed all the acts taxing capital stock prior to the act of June 8, 1891 (P. L. 229), and referred to many of the decisions in which these acts are construed and applied; and we have nowhere found it to be enacted or decided that, in estimating and appraising the value of the capital stock, any deduction is to be made because of the fact that the property of the corporation is incumbered. This question has, it is true, never been directly litigated and adjudicated, but the implication contained in the acts, from the fact that there is no provision on the subject, and that no claim has ever been made for a deduction of this account, is strong that such was not the intention of the acts. It remains to consider the effect of the act of 1891, under which the settlement appealed from in this case was made. The title to this act is 'An act to provide increased revenues for the purpose of relieving the burdens of local taxation * * * and providing for greater uniformity of taxation by taxing all the property of corporations, limited partnerships and joint stock associations having capital stock, at the rate of five mills on each dollar of its actual value.' We think we find here a distinct declaration that the purpose of this act is to impose a tax upon the property of the corporation to which it applies.

Defendant's counsel contends that the antecedent of 'its,'
264 in the concluding words of the title, 'five mills on each dollar of "its" actual value,' is 'capital stock.' But the plain reading of the sentence, required alike by its grammatical and logical construction, is that it declares an intention to tax 'at its actual value in cash all the property' of certain corporations, limited partnerships, and joint-stock associations, to wit, those 'having capital stock.' This construction is not in conflict with the expressions used in preamble 6, where it is evident that 'capital stock' is used as a synonym for bonds, mortgages and moneys at interest, and franchises and property of other kinds; and, being so used in the preamble, we think we are warranted in assuming that it is used in the same sense in the body of the act. This act also made important changes in the method of assessing the tax. The rate per cent. of dividend is no longer the measure of the amount of tax, but in all cases the capital stock is to be estimated and appraised by the officers of the corporation 'at its actual value in cash, not less, however, than the average price which said stock sold for during said year, and not less than the price or value indicated or measured by net earnings or by the amount of profit made and either declared in dividends or carried into surplus or sinking fund.' And the act further provides 'that if the auditor general and state treasurer, or either of them, is not satisfied with the appraisement and valuation so made and returned, they are hereby authorized and empowered to make a valuation thereof, based upon the facts contained in the report herein required or upon any information within their possession or that shall come into their possession, and to settle an account on the valuation so made by them for the taxes, penalties and interest due the commonwealth thereon.' And, while it is the capital
265 stock that is to be appraised, we have just seen that the title of the act declares that the property is to be taxed, and preamble 6 defined what is meant by 'capital stock' when it declared that the tax is to be imposed on 'their whole capital stock,' including as well their bonds, mortgages and moneys at interest, as their franchises and property of other kinds.'

"In settling accounts against various corporations for the first year after this act came into force, the auditor general construed the proviso that the actual value in cash was to be 'not less than the price or value indicated or measured by net earnings or by the amount of profit made and either declared in dividends or carried into surplus or sinking fund' to prescribe a hard and fast rule that the capital stock must be appraised at not less than a principal sum, six per cent. of which would equal the net earnings of the corporation for the tax year. And he settled accounts on that basis against a number of corporations, from which settlements they appealed to this court, where, on the trial of the cases, it was decided that this construction of the act was erroneous; that the net earnings constituted only one fact to be considered in determining the actual value of the capital stock, and that the amount and rate per cent. of dividends made and the amount accrued to surplus and sinking fund during the tax year do not furnish an absolute indication or measure of the actual value in cash of the capital stock of a corpora-

tion, but are to be considered with all other relevant facts in determining what is its actual value; that the prominent idea or thought of the whole act was to base taxation on the actual cash value; and that this should be determined from facts, and not theories, on all cases except the one that this value should in no case be less than the average price at which the stock sold during the year.
266 Com. *v.* Edgerton Coal Co., 164 Pa. St. 284, 30 Atl. 125, 129. And in Commonwealth against Haney Transfer Co. (141, Jan. term 1895), decided by this court, and not reported, it was said, in the opinion of Judge McPherson, that the question of actual value in cash is a question of fact, which must be determined by considering the value of defendant's tangible property, the amount of its business, the rate of dividend declared, and the extent and value of its good will and franchises and privileges, as indicated by the evidence bearing upon those subjects at that particular time. In Com. *v.* Delaware, S. & S. R. R., 165 Pa. St. 44, 30 Atl. 522, 523, it was contended by the defendant that the franchises of a corporation were not to be included and appraised in estimating the value of its capital stock. But we decided that the franchise of the corporation was an element to be considered in ascertaining the value of capital stock; and it was said in the opinion of the supreme court, affirming this decision (page 54, 165 Pa. St., and page 523, 30 Atl.): 'In ascertaining the actual value of the capital stock, was it proper to take into consideration, as affecting that value, the franchises of the company? We think this question is affirmatively answered by the act of June 8, 1891, under which the valuation was made. The capital stock represents the franchises as well as other property of the company. In the sixth preamble of the act there appears a plain legislative purpose to include the franchise in fixing the value of the stock, and this is in harmony with the title and the provisions in respect to the taxation of it.'

"The able counsel for defendant lays great stress on the fact that, in the taxing acts and in the decisions of the courts construing them, it is the capital stock which is said to be taxed, but a care-
267 ful reading of the acts and the decisions will show that the words 'capital stock' are used as a convenient term to connect property, tangible and intangible, of the corporation. This is implied when it is said that a tax on the capital stock is a tax on the property and assets of the company; and when it is enacted that the tax shall be 'at a fixed rate of five mills upon each dollar of the actual value of their whole capital stock, including as well their bonds, mortgages and moneys at interest, as their franchises and property of other kinds;' and more definitely still when it is declared in the act of 1891, 'that for the purpose of this act interests in limited partnerships or joint stock associations shall be deemed to be capital stock and taxable accordingly.' That is to say, as a matter of fact, a limited partnership has no 'capital stock,' in the common acceptation of the term, but every partner has a definite proportional interest in the assets of the company, and, for the purpose of taxation under this act, this interest 'shall be deemed to be capital stock and be taxable accordingly.' Clearly, then, when nominally the

capital stock is taxed, it is in reality the property and assets of the company that are taxed, and the only way in which the value of the capital stock can be ascertained is by ascertaining the value of the property and assets. This illustrates the truth of the remark made by Mr. Justice Paxson, already quoted, that 'the capital stock is nothing; a myth, a mere name, excepting in so far as it is represented by investments made with the money paid into the treasury of the corporation on account of such capital stock.' In a limited partnership it is literally nothing but a name apart from the assets, and in a corporation proper it is really nothing more, although we are accustomed to conceive of it as a separate entity.

268 "Counsel also argues that the form of the report required to be made by the act of 1891 does not call for a statement of the amount and value of the property and assets of the corporation, and, therefore, that it is not the property that is to be appraised. But, as we have seen, the value of the property must be ascertained whenever the tax is to be apportioned or a limited partnership is to be taxed, and, while it is true that the form of the report does not call for such definite information as to the actual value of the property and assets of the corporation as it might, the reason probably is that in the main it was copied from the prior acts without careful attention to the change.

"The conclusion that the value of incumbrances should not be deducted would seem to be greatly strengthened when the matter is examined in the light of the doctrines in Com. *v.* Fall Brook Coal Co., 156 Pa. St. 488, 26 Atl. 1071. It is there decided that the capital stock of the corporation, and the shares into which the capital is divided, are, at least for the purpose of taxation, identical, and that the shareholders are the real owners of the property and assets, which both the capital stock and the shares represent, and that they are the persons who are taxed when a tax is imposed upon either the capital stock or the shares. A corporation is (page 494, 156 Pa. St., and page 1071, 26 Atl.) said to be 'an artificial person created by law for the purpose of becoming the business representative, agent, or trustee of so many persons as may join to furnish the money with which the business to be done by the corporation may be carried on. * * * The money furnished by those whose representative it is to be is its capital stock. The amount that each person contributes to this fund is his share in the venture, and is called his

269 share or shares in the stock. The legal title to the whole sum so contributed is in the corporation, and so the legal title to all the property, real or personal, in which it may be invested. The equitable title—that is, the right to the profits from the business done, and to a return of the capital when the corporation is dissolved—is in the stockholders. * * * As in the ordinary case of trustee and *cestui que trust*, the real owners are the beneficiaries. The opinion in this case also states that the principle upon which it is proper to tax land without regard to the incumbrances upon it is that there is no community of interest between the owner of the land and the owner of the money borrowed and invested in the land, and that to tax both is not double taxation; that 'in

that case there are two distinct subjects of taxation, each of which is made taxable by an express provision of the law. The farm is taxable as land, against whoever may be the owner, without regard to the incumbrances upon it. The sum secured by the mortgage is taxable as money at interest, regardless of the use the borrower may make of it. If the owner of the land is compelled to incumber it, it may be his misfortune; but the man who lends money to him has no connection with him in title. There is in such case no double taxation. The land is taxed once to its owner. The money at interest is taxed once to its owner. They are distinctly different taxpayers, and pay taxes upon distinctly different subjects of taxation.

"We have, then, these principles: A tax on the capital stock of a corporation is a tax on its property and assets. The corporation is simply a trustee for its stockholders, and they are the real owners of the property, or, as expressed by the learned justice, it is 'the ordinary case of trustee and *cestui que trust.*' The beneficiaries
270 are the real owners. And whether the property is taxed in the name of the corporation or in the name of the shareholders, the ultimate burden falls upon the same persons. The facts that the tax is called a tax on capital stock is therefore not of the essence of the matter. Whatever called, it is a tax on the property and assets of the shareholders for whom the corporation is simply trustee. Neither is it vital that it is taxed in the name of the trustee. The shareholders are the real owners of the property taxed, and the tax is therefore a tax on their property. But, when the property of individuals is taxed, no reduction is made because the property is incumbered. It is therefore not easy to see why there should be any specific reduction made for individuals simply because their trustee is a corporation. As was said by Mr. Justice Miller, in State Railroad Tax Cases, 92 U. S., at page 605: 'Individuals do not escape taxation on their real and personal property because they are insolvent. * * * No state has ventured to establish the principle of permitting its visible tangible property to escape taxation, relying solely on a tax imposed on the individual on the basis of his estimated wealth in excess of his debts.' The consequence of establishing such a principle in Pennsylvania would be so serious that we cannot believe the legislature has ventured so to do. There are, as is well known, many railroad corporations in the state, which like the one in question in this case, were built at an extravagant cost, met chiefly by borrowed money, which are now insolvent, and whose net earnings are not sufficient to pay the interest on their sometimes enormous funded debt, yet they are valuable franchises which have been granted by the state, as well as tangible property,
which, for the uses to which it is applied, is worth in many
271 cases millions of dollars. All these, under the construction of the act of 1891 contended for on behalf of defendant, would entirely escape taxation by the state, and are not subject to local taxation, while the property of individuals who have no franchise from the state is taxed without regard to their insolvency. And the injustice and impolicy of such a construction is presented in a yet stronger light when we remember that in many cases—

and notably in the one now before us—nearly all the funded debt secured by the incumbrances on the insolvent corporation's property is held by residents of other states or foreign countries; so that, if it is not taxable against the insolvent corporation, neither can it be reached, in theory even, by taxing the evidences of indebtedness. The result would be that property within the borders of the state worth many millions of dollars would be entirely exempted from taxation.

"Conclusions of Law.

"(1) A tax on the capital stock of a corporation is a tax on its property and assets, including its franchises. The question of the actual value in cash of the capital stock is a question of fact, which must be determined by considering the value of defendant's tangible property, and assets of every kind, including its bonds, mortgages and money at interest, and its franchises and privileges; and the amount of the incumbrances on its property and franchises is also a relevant fact to be considered, but it is not to be specifically deducted from the valuation so ascertained and determined.

"(2) The commonwealth is entitled to recover from defendant in this case a tax at the rate of five mills on the dollar on the actual value in cash of 126.18–510.20 parts of the capital stock of
272 defendant amounting to.....with interest at the rate of twelve (12) per cent. from September 30, 1896, and attorney general's commission at the rate of five (5) per cent.

"(3) Judgment is therefore directed to be entered in favor of the commonwealth and against the defendant as follows:

Tax, five (5) mills on.....
Interest at twelve (12) per cent. per annum from October 1, 1896, to April 8, 1897
Attorney General's commissions, 5 per cent.....

Total .....

"

M. E. Olmsted, for appellant.
John P. Elkin, Dep. Atty. Gen., and Henry C. McCormick, Atty. Gen., for the Commonwealth.

DEAN, *J.:*

All the material facts of this case are stated in the opinion of the court below. The finding of a fact determines the amount of the judgment. The accounting officers of the commonwealth and the court adopt a like construction of the statute, but, differing in their views of the evidence, differ in results. The officers of the defendant corporation, putting a wholly different construction on the statute, largely differ from both as to the fact. The defendant appraised its capital stock as of no value whatever. The commonwealth appraises it at $34,480,577.70. The court below appraises it at less than half that amount. The main dispute between the commonwealth and defendant is as to the construction of the act of 1891.

It may be conceded at once that the legislative intent to levy the higher amount must be express, or result from necessary implication; for, if in a tax law the intent is doubtful, it does not exist.

273 The title of the act declares the purpose to be to tax "all the property of corporations, limited partnerships and joint stock associations having capital stock, at the rate of five mills on each dollar of its actual value." Could legislative language be plainer? All the property of corporations is to be taxed at the rate of five mills on each dollar of its actual value. The words "having capital stock" are used to distinguish such corporations from beneficial, religious and other corporations having membership, but not capital stock representing the respective interests of members in the corporate property. Then, preamble 6 of the act further declares it to be the purpose to tax "all corporations, limited partnerships and joint stock associations having capital stock, at a fixed rate of five mills upon each dollar of the actual value of their whole capital stock, including as well their bonds, mortgages and moneys at interest, as their franchises and property of other kinds. In Com. *v.* Standard Oil Co., 101 Pa., St. 119, speaking by Paxson, *J.*, this court held: "It has been repeatedly decided, and is settled law, that a tax upon the capital stock of a company is a tax upon its property and assets." Then in Appeal of Fox, 112 Pa., St. 354, 4 Atl., 155, it is said: "The capital stock is nothing—a myth; a mere name, excepting in so far as it is represented by investments made with the money paid into the treasury of the corporation on account of such capital stock. Hence it is that the courts have long since declared that a tax upon the capital stock of a corporation is a tax upon the assets and property of such corporation." In Com. *v.* Delaware, S. & S. R. Co., 165 Pa., St. 44; 30 Atl., 522, 523 (opinion by McCollum, *J.*), we said: "In ascertaining the actual value of the capital stock, was it proper to take into consideration, affecting the value, the

274 franchise of the company? We think this question is affirmatively answered by the act of June 8, 1891, under which the valuation was made. The capital stock represents the franchises as well as other property of the company. In the sixth preamble of the act there appears a plain legislative purpose to include the franchises in fixing the value of the stock, and this is in harmony with the title and provisions in respect to the taxation of it." There are other cases to the same effect. The statute having thus, in express terms, declared the subject of taxation to be all the property of corporations having capital stock, and the settled interpretation by this court of a tax on capital stock of a corporation being that it is a tax upon all the property of the corporation, it is clear the learned judge of the court below committed no error in the first sentence of his conclusion of law, thus: "A tax on the capital stock of a corporation is a tax on its property and assets, including its franchises."

The main contention, however, is over the last part of the conclusions, as follows: "The question of the actual value in cash of the capital stock is a question of fact, which must be determined by considering the value of the defendant's tangible property and assets

of every kind, including its bonds, mortgages and moneys at interest, and its franchises and privileges, and the amount of the incumbrances on its property and franchises is also a relevant fact to be considered, but it is not to be specifically deducted from the valuation so ascertained and determined." The contention of the appellant's counsel in substance is that, to ascertain the actual value, there should be deducted the amount of the corporation indebtedness from the aggregate fairly appraised value of the corporate property. The remainder would then represent the actual value of the capital stock.

This would in many cases hide the tangible property, and
275 turn the commonwealth over to the assessment and collection of its revenues from nothing; in the face, too, of what we have repeatedly decided—that a tax upon the capital stock of a company is a tax upon its property and assets. The legislature might have so worded the statute that such result as that contended for would follow, namely, that solvent corporations should pay taxes, and insolvent ones not; but, with our decisions in 1882 and 1886, and the declared law long preceding them, that "capital stock" in taxing statutes, meant the property and assets of the corporation, before them, they declared, in the act of 1891, precisely to the contrary. In fact, from the wording of preamble 6 of the act of 1891, we do not doubt that, at least, the framer of the act was familiar with the opinion of this court in Com. *vs.* Standard Oil Co., *supra*.

In supporting their arguments on each side, counsel have given undue significance to the indebtedness of the corporation. Strictly speaking, in view of the purpose of this statute, the debt is almost as much of a myth as the certificate of capital stock. The declared purpose is to tax the capital stock by ascertaining its value in view of the tangible assets of corporations, what was owing to them, the value of their franchises, and the rights and privileges they possessed under their grants. The commonwealth no more sought, by the act of 1891, to ascertain and tax the net assets of these artificial beings, than, by the usual tax laws, she seeks to tax the net assets of natural ones. In the latter case she rarely inquires as to what the taxpayer owes. She does ask what he is possessed of. It is only when the attempt is made to tax his creditor that, incidentally, what is owing by the debtor becomes of interest to the taxing power. We have no hesitation in holding that it would be manifest
276 error to adopt the amount of the debt as a part of the value of the corporate property; and it would be just as erroneous to hold that it should be deducted from the aggregate value of the property, and thereby withdraw tangible property to that extent from taxation. In either case it would be dragging in a fact of but slight consequence, and making it the prominent and controlling one in the issue, in the face of the declared purpose of the statute to tax the actual value of the capital stock, as indicated by the franchise and property. In the case of Com. *v.* Standard Oil Co., *supra*, Paxson, *J.*, in referring to the fact that the certificates of stock were in possession of the owner in Ohio, where the corporation was domiciled, says: "It follows, necessarily, that shares of stock in a Pennsylvania corporation, held by a corporation or individual domi-

ciled in another state, cannot be taxed here. One sufficient reason is that there is nothing here to tax. The capital stock—that is, the property and assets—are here, and are taxed." In other words, the shares themselves, which represent the owner's interest less debts, have so little to do with the subject of taxation—the capital stock—that it is immaterial where they are held, or who holds them. The property and assets—the capital stock—being in this state, that, alone, is within reach of the taxing power. Now, what change is worked in this tangible property by subjecting it to a debt of the owner? In the case cited, the certificates and owner were both in a foreign jurisdiction; yet, the property and franchise being within the jurisdiction, the authority of the commonwealth to tax the capital stock, on ascertaining its value from what was within the jurisdiction, was upheld. If he cannot withdraw his tangible
277 property from taxation, by taking his title to it, and person, outside state boundaries, how can he do so by voluntarily pledging it for a debt? That the owner subjects it to a debt in no way changes the relation of the commonwealth to it as a subject of taxation. It constitutes precisely the same capital stock as before. His relation to his own property has been somewhat changed, for, by the mortgage debt, he has admitted others to a share of the income, and has given them a lien for their debt. His title, however, remains just the same as if the owner of the legal title to land had placed a mortgage upon it. All the indications of ownership, the possession of the deed, and dominion over the property, continue, as if no debt had been created. As is said by our Brother Williams in Com. *v.* Fall Brook Coal Co., 156 Pa., St. 488, 26 Atl. 1071, speaking of the power of the commonwealth to tax the land as well as the mortgage upon it: "In that case there are two distinct subjects of taxation, each of which is made taxable by an express provision of the law. The farm is taxable as land, against whomsoever may be the owner, without regard to the incumbrances upon it. * * * The land is taxable once to the owner. The money is taxed once to its owner. They are distinctly different taxpayers, and pay taxes upon distinctly different subjects of taxation." The debt as an item of evidence, may have bearing in fixing the value of the franchise; but from the nature of the property, and the character of the debt, its affirmative weight in establishing value is significant; for of all forms of debt, as an indication of actual value of the thing pledged, the ordinary railroad mortgage is the most unreliable, and especially is this the case when the mortgage is executed to carry out a reorganization plan of security holders in a bank-
278 rupt road. Without adverting further to the history of this road it is sufficient to say that its mortgage debt is always far in excess of any possible value of the property. We do not know just what prominence was given by the learned Judge of the court below to the amount of indebtedness in reducing the actual value of the capital stock. He says, in the conclusion of law already quoted, that the question of actual value in cash of the capital stock is one of fact, to be determined by considering the value of defendant's tangible property, etc. "And the amount of incumbrances on its

property and franchises is also a relevant fact to be considered, but it is not to be specifically deducted from the valuation so ascertained and determined." That he gave no weight whatever to it, even as affirmative evidence tending to establish the value of the stock as claimed by the commonwealth, is clear. That he treated it as a relevant fact favoring defendant, and tending to reduce the actual value, although not to be specifically deducted, is also clear; and in this he was correct. That a large debt, one largely out of proportion to the value of the property, secured by mortgage, with interest payable semi-annually, constituting what is called a "fixed charge," seriously depreciates the actual value of the property, cannot be questioned. Default in any payment of interest puts the property in peril of seizure and sale to satisfy not only the overdue interest, but the whole debt. A property heavily incumbered, as is this one, is liable to pass into the hands of the mortgage creditors at any time. But counsel for defendant planted himself on a demand for an absolute deduction of the whole amount from the appraised value, and made no request for a specific finding of fact in this particular. It was not, therefore, incumbent on the court to specify in the
279 finding exactly what weight was given to a particular fact; and we assume that it had all the effect that it was entitled to.

The argument that different methods were adopted by the commonwealth's officers in ascertaining the actual value of the capital stock of corporations, and therefore there has been want of uniformity and a discrimination, is not well founded. As the learned Judge of the court below shows, prior to the act of 1891 the basis of taxation value, by the taxing acts, was the net earnings; but the latter act declares that the capital stock shall be appraised "at its actual value in cash, not less, however, than the average price which said stock sold for during said year, and not less than the price or value indicated or measured by net earnings, or by the amount of profit made, and either declared in dividends or carried into surplus or sinking fund." A minimum appraisement is here fixed for solvent corporations. In most cases, doubtless, the corporation officers and the commonwealth, in estimating the actual value of a sol-ent, well-managed road, would adopt it—and properly, too—as a fair basis in estimating the actual value of the capital stock. But the act of 1891 was intended to reach also the bankrupt road, which may have the same mileage, the same traffic, and the same privileges as the solvent one. The state conferred upon it the right of eminent domain, for location and extension of branches or feeders, as well as for necessary improvements. Being constructed, it now has the right, under the protection of the laws, to operate it in carrying freight and passengers. As the same rule for a fair estimate of the actual value of the capital stock cannot be adopted as in case of the solvent roads, and the commonwealth's officers being dissatisfied with the corpor-
280 ate officers' appraisement, they proceed, under the authority expressly given, to make an appraisement, upon the facts in the report, and other information within their possession. Upon appeal, the court differs from them in their inferences, and reduces largely the amount subject to tax. On the number of miles of road

in Pennsylvania—about 127 of a total of 430—with a capital stock of the actual value, as a whole of $15,000,000, the court fixes the actual value of the capital stock of the 127 miles in this state at only a little over $3,500,000. The method of determining the proportion of stock taxable in Pennsylvania has been repeatedly decided to be the correct one. The figures, certainly, do not indicate an excessive valuation of the capital stock of 127 miles of railroad. As between the defendant and solvent roads of the same physical character, there is no discrimination as concerns results, in favor of the solvent ones; for the latter are rated as high as $40 to $52 per share, while this one is less than one-third that amount. The actual value being a pure question of fact, appellant has no standing to complain of discrimination in methods, so long as its stock is not assessed in excess of that value. It may be that the Reading and some other corporations are taxed on less than the actual value of their capital stock. If so, the commonwealth is not here appealing, and consequently it is not our business to inquire into the matter. We can only say that, after a most careful examination of the whole case, we find neither error of fact nor law in the judgment of the court below, and it is therefore affirmed.

MITCHELL, *J.*:

I dissent in this and kindred cases, known as the "Capital Stock Cases," because I am of opinion that the decision is founded on a fundamental error, in confusing a tax on the property of
281 the corporation with the tax on the property of the individual shareholder therein, which is what the statute imposes. The subject matter of taxation under the act of June 8, 1891, is capital stock, *eo nomine*, independently and without reference to the property which it represents. It is to be taxed at its "actual value in cash, not less however than the average price which said stock sold for during said year," etc. The officers of the corporation concerned are required to make sworn returns under seventeen specific heads, all of which tend to show the value of the stock as such, and not a single one of which refers directly or indirectly to the value of the property which such stock represents. The value of the capital stock in the hands of the shareholders is the value of their resulting interest in the property of the corporation subject to its debts and incumbrances, in view of the use to which it may be put under its corporate franchises, etc.; and the value of such resulting interest is the true subject of tax under the statute. As construed by this decision, the tax is put on the value of the property of the corporation, without regard to the value of the capital stock in the hands of the shareholders. This is a total change in the subject of taxation, without any warrant in the statute, and against its plain language and intent.

Green and Williams, JJ., join in this dissent.

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Exhibit G.

New York Central & Hudson River Railroad Co.

New York, 6–5–1905.

Dear Sir: Below please find movements of N. Y. C. Car number 90350 from Weehawken to San Francisco.

C. H. Ewings,
Car Acc't.

Movements.	Date. Month.	Day.	Year.	L. or E. Time.	Train.	Con.
Rec'd from				M.	Mo. Pacific.	
From W'kn.	3	2	04	M.	C. R. I. & P.	
To Susp. Bridge	3	4		M.	Mo. Pac. 7-2	
To M. C.	3	4		MM.	C. B. & Q. 7-11	
To Chicago Belt	3	8		M.	C. G. W. 7-11	
To C. G. W.	3	9		M.	Wabash 7-12	
To K. C. C. B.	3	13		M.	M. C. 7-23	
To C. B. Q. & Mo. Pac.	3	13		M.	N. Y. C. 7-31	
To D. & R. G.	3	17		M.		
To R. G. W.	3	18		M.		
To So. Pacific	3	19		M.		
To R. G. W.	4	10		M.		
To D. & R. G.	4	16		M.		
To Mo. Pac.	5	2		M.		
To D. & R. G.	5	3		M.		
Del'd to Mo. Pac.	5	19				

New York Central & Hudson River Railroad Co.

New York, 6–5–1905.

Dear Sir: Below please find movements of N. Y. C. Car number 63379 from Weehawken to Minneapolis.

C. H. Ewings,
Car Acc't.

Movements.	Date. Month.	Day.	Year.	L. or E. Time.	Train.	Con.
Rec'd from				M.	To Erie 4-27	
From W'kn.	3	11	04	M.	N.Y.C.& St.L. 5-18	
To Susp. Bridge	3	14		M.		
To Wabash	3	14		M.		
To C. Belt	3	18		M.		
To Wisc. Cent.	"	"		M.		
To Gt. North.	3	22		M.		
To C. St. P. M. & O.	3	23		M.		
To Gt. North.	3	25		M.		
To Wisc. Cent.	3	28		M.		
To Gt. North.	3	28		M.		
To M. & W.	3	29		M.		
To Gt. North.	—			M.		
To Wisc. Cent.	3	31		M.		
To E. J. & E.	4	3				
Del'd to N. Y. C. & St. L.	4	14				

283 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6–5–1905.

DEAR SIR: Below please find movements of N. Y. C. Car number 11645 from Weehawken to Victoria, B. C.

C. H. EWINGS, Car Acc't.

MOVEMENTS.	MONTH.	DAY.	YEAR.		L. OR E. TIME.	TRAIN.	CON.
Rec'd from				M—To Erie	6	22	
From W'kn.	3	12	04	M—P. & L. E.	6	23	
To Ogdensburgh ...	3	15		M—Erie	7	3	
To C. P.	3	15		M—L. S. & M. S.	—	—	
To N. Y. C.	4	1		M—C. M. & St. P.	7	13	
To C. North.	4	26		M—L. S. & M. S.	7	21	
To M. C.	4	26		M—C. R. & I. P.	7	24	
To W. & L. E.	5	3		M—C. T. Transfer	7	25	
To C. H. & D.	5	3		M—C. R. & I.	8	23	
To C. & O.	5	6		M—L. S. & M. S.	—	—	
To C. H. & D.	5	27		M—P. R. R.	8	8	
To L. E. & W.	6	11		M—L. S. & M. S.	8	29	
To L. S. & M. S. ...	6	15		M			
To L. E. & W.	6	16		M			
To L. S. & M. S. ...	6	16					
Del'd to							

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6–5–1905.

DEAR SIR: Below please find movements of N. Y. C. Car number 46260 from Weehawken to Medicine Lodge, Kas.

C. H. EWING, Car Acc't.

MOVEMENTS.	MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from					M		
From W'kn.	3	15	04		M		
To Susp. Bridge	3	20			M		
To Wabash	3	21			M		
To C. Belt	3	24			M		
To A. T. & S. F.	3	24			M		
To M. C.	3	26			M		
To Chic. Junct.	3	26			M		
To Wabash	3	27			M		
To Chic. Jct.	3	29			M		
To Mich. Cent.	3	29			M		
To N. Y. C.	4	5			M		
To					M		
From					M		
To					M		
Del'd					M		

284 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6–5–1905.

DEAR SIR: Below please find movements of N. Y. C. Car numbered 64397 from Weehawken to Hamilton, Ont.

C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E. TIME.	TRAIN.	CON.
Rec'd from				M. L. S. & M. S.		
From W'kn.	3	17	04	M. C. N. W.	6	14
To Ogdensburgh	3	21		M. L. S. & M. S.	6	21
To C. P.	3	21		M. E. J. & E.	6	23
To D. S. S. & A.	3	25		M. L. S. & M. S.	6	29
To M. C.	5	3		M. L. V.	7	2
To G. T.	5	12		M. W. & N. B.	7	5
To M. C.	5	17		M. P. & R.	7	16
To L. S. & M. S.	5	22		M. N. Y. C.	7	18
To M. C.	5	23		M.		
To L. S. & M. S.	5	27		M.		
To M. C.	5	27		M.		
To L. S. & M. S.	5	28		M		
To Erie	6	1		M.		
To P. & L. E.	6	2		M.		
Del'd to Erie	6	10				

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6–5–1905.

DEAR SIR: Below please find movements of N. Y. C. Car number 24241 from Weehawken to Winnipeg.

C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from					M		
From W'kn.	3	18	04		M		
To Ogdensburgh	3	22			M		
To C. P.	3	25			M		
To N. Y. C.	4	7			M		
From					M		
To					M		
From					M		
To					M		
From					M		
To					M		
From					M		
To					M		
From					M		
To					M		
Del'd to					M		

285 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6–5–1905.

DEAR SIR: Below please find movements of N. Y. C. Car number 64887 from Weehawken to Minneapolis.

C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from					M		
From W'kn.	3	21	04		M		
To Ogdensburgh	3	25			M		
To C. P.	3	26			M		
To N. Y. C.	4	11			M		
From					M		
To					M		
From					M		
To					M		
From					M		
To					M		
From					M		
To					M		
From					M		
To					M		
Del'd to							

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6–5–1905.

DEAR SIR: Below please find movements of N. Y. C. Car number 65224 from Weehawken to Duluth.

C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from					M		
From W'kn.	3	27	04		M		
To Ogdensburgh	3	31			M		
To C. P.	4	2			M		
To Hull Electric Co.	4	9			M		
To C. P.	4	2			M		
To N. Y. C.	4	22			M		
From					M		
To					M		
From					M		
To					M		
From					M		
To					M		
From					M		
To					M		
Del'd to							

286 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK, upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Relator,

against

OTTO KELSEY, as Comptroller of the State of New York, Respondent.

Stipulation under Sections 3301 and 1353 of the Code of Civil Procedure.

It is hereby stipulated, under Section 3301 of the Code of Civil Procedure, that the foregoing are true copies of the petition for writ of certiorari, order of issuance of writ, writ, and return to writ, and certification thereof, as required by Section 1353 of the Code of Civil Procedure, is hereby waived.

Dated New York, October 21, 1905.

IRA A. PLACE,
Attorney for Relator.
JULIUS M. MAYER,
Attorney-General,
Attorney for Respondent.

287 *Order of Appellate Division.*

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department of said State, at the Appellate Division Court Room, in the City of Albany, commencing on the 14th day of November, 1905.

Present: Hon. Charles E. Parker, Presiding Justice. Walter Lloyd Smith, Emory A. Chase, Alden Chester, John M. Kellogg, Associate Justices.

THE PEOPLE OF THE STATE OF NEW YORK, upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Relator,

vs.

OTTO KELSEY, as Comptroller of the State of New York, Respondent.

Tax of 1903.

This case having been brought on for hearing and argument upon the writ of certiorari and return and the papers upon which the writ was granted and having been submitted on printed brief and argument by Ira A. Place, Esq., of counsel for the relator, and by
288 Horace McGuire, Esq., Deputy Attorney General, of counsel for the respondent,

Now, on motion of Julius M. Mayer, Attorney General, attorney for the respondent,

It is ordered that the determination of the Comptroller be and the same here- is unanimously confirmed, with fifty dollars costs and disbursements.

JOSEPH H. HOLLANDS, *Clerk.*

[L. S.] A copy.
JOSEPH H. HOLLANDS.

SIR: Take notice, that the within is a copy of an order duly filed and entered in the office of the Clerk of Albany County on the 5th day of December, 1905.

Yours, etc.,

JULIUS M. MAYER,
Attorney General, Attorney for Respondent.

To Ira A. Place, Attorney for Relator.

289 *Affidavit of No Opinion.*

Supreme Court, Appellate Division—Third Department.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Relator,

against

OTTO KELSEY, as Comptroller of the State of New York, Respondent.

Tax of 1903.

STATE AND COUNTY OF NEW YORK, *ss:*

Thomas Emery, being duly sworn, says: That he is an attorney and counselor at law, and associate counsel for the relator The New York Central and Hudson River Railroad Company in the above-entitled action.

That no opinion was handed down by the Appellate Division herein.

THOMAS EMERY.

Sworn to before me this 6th day of December, 1905.

GEO. T. BROWN,
Notary Public, Westchester County.

Certificate filed in New York County.

290 *Relator's Notice of Appeal to Court of Appeals.*

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Relator,

against

OTTO KELSEY, as Comptroller of the State of New York, Respondent.

Notice of Appeal to Court of Appeals.

Tax of 1903.

SIRS: Please take notice that the relator in the above-entitled action hereby appeals to the Court of Appeals from the order of the Appellate Division of the Supreme Court, Third Department, entered herein in the office of the Clerk of the County of Albany, on the 5th day of December, 1905, and from each and every part of said order.

Dated New York, December 5th, 1905.

Yours, &c.,
IRA A. PLACE,
Attorney for Relator, Room 417 Grand Central Station, Borough of Manhattan, New York City, N. Y.

To Julius M. Mayer, Esq., Attorney for Respondent, Capitol, Albany, N. Y., and Clerk of the County of Albany, Albany, N. Y.

291 *Stipulation.*

In the Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant,

against

OTTO KELSEY, as Comptroller of the State of New York, Respondent.

Stipulation Under Sections 3301 *and* 1353 *of the Code of Civil Procedure.*

Tax of 1903.

It is hereby stipulated, under Section 3301 of the Code of Civil Procedure, that the foregoing are true copies of the notice of appeal, the order appealed from and the papers upon which the Court below acted in making said order, on file in the office of the Clerk of Albany County, and certification thereof, as required by Section 1353 of the Code of Civil Procedure, is hereby waived.

Dated Borough of Manhattan, New York City, December 6th, 1905.

IRA A. PLACE,
Attorney for Appellant.
JULIUS M. MAYER,
Attorney-General, Attorney for Respondent.

292 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, held at the capitol in the city of Albany, on the 23rd day of January, in the year of our Lord one thousand nine hundred and six before the judges of said court.

Witness the Honorable Edgar M. Cullen, chief judge presiding.
W. H. SHANKLAND, *Clerk.*

Amended Remittitur, January 31st, 1906.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant,

against

OTTO KELSEY, as Comptroller of the State of New York, Respondent.

Tax of 1903.

Be it remembered, that on the 15th day of December in the year of our Lord one thousand nine hundred and five, The New York Central and Hudson River Railroad Company, the appellant in this proceeding, came here into the Court of Appeals, by Ira A. Place, its attorney, and filed in the said court a notice of appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department, and Otto Kelsey, as Comptroller of the State of New York, the respondent in said proceeding, afterwards appeared in said Court of Appeals, by Julius M. Mayer, Attorney-General and attorney for said respondent, which said notice of appeal and the return thereto filed as aforesaid, are hereunto annexed.

Whereupon the said cause having been submitted to the
293 said Court of Appeals upon the printed briefs of counsel on behalf of the said respective parties, and after due deliberation thereon, the court did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from in this proceeding be and the same hereby is in all things affirmed with costs. The relator having contended herein that the statute if it purport to authorize the said tax, and the authority exercised under the Statute in and by the imposition and exaction of the said tax are and each thereof is violative of the Constitution of the United States in the several particulars following; the court hold and adjudge that the statute under and in pursuance of which the tax herein complained of is imposed and exacted does not, and the authority exercised under this Statute in and by the imposition and exaction of the said tax does not, (1) offend against the commerce clause Article 1 Section 8 of the Constitution of the United States; (2) nor contravene the provisions of Article 1 Section 10 thereof forbidding impairment of the obligations of contracts; (3) nor offend against Article 4 Section 1

thereof requiring that full faith and credit shall be given in each State to the public acts of every other State; (4) nor offend against the provisions of the fourteenth amendment thereof forbidding the State to deprive any person of property without due process of law, and forbidding the State to deny to any person within its jurisdiction the equal protection of the laws.

And it was further ordered that the record aforesaid and the proceedings in this court be remitted to the said Supreme Court, there to be proceeded upon according to law.

Whereupon it is considered that the said order be in all things affirmed with costs as aforesaid and stand in full force strength and effect.

294 And hereupon as well the notice of appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the justices thereof &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office.

ALBANY, *January* 31*st*, 1906.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said proceeding in the Court of Appeals with the papers originally filed therein and attached thereto.

[Seal Court of Appeals State of New York.]

W. H. SHANKLAND, *Clerk.*

295 *Memorandum.*

Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant,

vs.

OTTO KELSEY, as Comptroller of the State of New York, Respondent.

Argued January 9th, 1906; decided January 23, 1906.

Ira A. Place, for appellant.
Horace McGuire, Deputy Atty. General, for respondent.

Three appeals from determinations of the Appellate Division, third department, which unanimously affirmed the determinations

of the Comptroller of the State of New York in assessing the relator for its annual franchise tax for the years 1902, 1903 and 1904.

The orders in all three cases affirmed, with costs.

No opinion.

Concur: Cullen, Ch. J., O'Brien, Haight, Vann, Werner, Willard Bartlett and Hiscock, JJ.

296 [Endorsed:] In the Court of Appeals of the State of New York. The People of the State of New York, Upon the Relation of The New York Central and Hudson River Railroad Company, Appellant, *vs.* Otto Kelsey, as Comptroller of the State of New York, Respondent. Memorandum. Tax of 1903.

297 *Assignment of Errors.*

In the Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Plaintiff in Error,

against

OTTO KELSEY, as Comptroller of the State of New York, Defendant in Error.

(Tax of 1903.)

To the Honorable Justices of the Supreme Court of the United States:

Come now the said petitioners, plaintiffs in error, and respectfully show to the Court that there is in the said record and proceedings manifest error upon which they will rely in and for their prosecution of the writ of error in the above entitled cause, to wit:

I. That the said Supreme Court of the State of New York erred in rendering, and the said Court of Appeals of the State of New York erred in affirming the final order and judgment wherein and whereby the provisions of section 182 of the Tax Law of the State of New York, and the authority exercised thereunder by the Comptroller of the State of New York, were held valid in and for franchise taxation of and upon the basis of the capital of the said relator invested and employed in the average number of its passenger, freight, mail, baggage and express cars which were in obedience to laws of the United States and in due course of business delivered by relator to and employed and used by other common carrier railroad cor-
298 porations outside of the State of New York in the through carriage of persons and property starting or consigned from the State of New York, Massachusetts, New Jersey and Pennsylvania, respectively, and destined to other states, and vice versa, and in transportation of persons and property between points in respective states other than and over routes wholly outside of the State of New York, and that such franchise tax did not offend against the commerce clause, Article 1, Section 8 of the Constitution of the United States.

II. That the said Courts, respectively, erred in holding and deciding the said statute valid authority of and for franchise taxation upon the basis of the capital of the said relator invested and employed in the average number of its passenger, freight, baggage, mail and express cars, which in obedience to the requirements of the United States statutes, and in the due process of business were transferred and surrendered by said relator to the possession of and used successively and interchangeably by other common carrier railroad corporations outside of the State of New York in the through carrying of persons and property between points in respective states other than New York State, and over routes outside of that state, all under authority of and in the exercise of franchises granted to them respectively by respective states other than the State of New York, and that the franchise tax thus computed and imposed did not impair the obligations of the contracts, arising upon, inhering in and pertaining to the grant, acceptance and use of the respective franchises whereunder the said cars of relator were thus operated and used outside of the State of New York by common carrier railroad corporations foreign to said
299 State of New York, and hence was not repugnant to Article 1, Section 10 of the Constitution of the United States.

III. That the said Courts, respectively, erred in holding and deciding the said statute valid authority of and for franchise taxation upon the basis of the capital of the said relator invested and employed in the average number of its passenger, freight, baggage, mail and express cars, which in the course of transportation business and in obedience to the requirements of the United States statutes, were by the said relator delivered to corporations foreign to the State of New York, and by such foreign corporations employed and used upon railroads operated by them respectively, in respective states other than New York State in the through carrying of persons and property starting or consigned from points in New York, Massachusetts, New Jersey or Pennsylvania, respectively, and destined to points outside of such respective state, and vice versa, and between points foreign to said several states via and over lines of railroad situate without the State of New York, all in the exercise of and under the authority of franchises granted by the respective states wherein the said operations were so carried on and conducted, and that such franchise tax did not impair the obligations of the contracts pertaining to such use of relator's cars by other corporations, and hence was not repugnant to Article 1, Section 10 of the Constitution of the United States.

IV. That the said Courts, respectively, erred in holding and deciding the said statute valid authority of and for and the exercise thereunder of said authority the valid imposition of franchise taxation in and by the State of New York upon the basis of the capital of relator invested and employed in the average number of
300 its cars which, in obedience to the requirements of the statutes of the United States, were delivered by relator to transportation corporations foreign to the State of New York, and operated and used by them wholly within states other than New York State, under authority of, and in the exercise of franchises granted by such other

states, respectively, to corporations created by them, and that the said statute and the said tax imposed under its authority, did not operate to deprive relator of its property or property rights without due process of law, and did not deprive relator of the equal protection of the laws and hence did not contravene the provisions of the fourteenth amendment to the Constitution of the United States.

V. That the said Courts, respectively, erred in holding and deciding that franchise taxation prescribed by, and imposed by the said Comptroller of the State of New York under the supposed authority of, said statute, upon the basis of relator's capital invested in the average number of its cars by it operated and used in the States of Massachusetts, New Jersey and Pennsylvania, respectively, in the transportation of persons and property between points within either of the said respective states, and between points within and points without such respective State, and between points of starting or shipment and points of destination without via and over routes in part within one or more of the said respective states, all under authority of and in the exercise of franchises granted by those states, respectively, to corporations created thereby and domiciled therein, and by the latter leased to the said relator, all subject unto the regulation of and under the authority and protection of the public acts of such respective state, did not burden or regulate interstate or foreign commerce, and hence did not offend against or contravene the provisions of
301 the commerce clause, Article 1, Section 8 of the Constitution of the United States; did not impair the obligations of contracts arising upon or inhering such obedience to the commerce laws of the United States, and therein did not contravene Article 1, Section 10 of the Constitution of the United States; and did not deny or refuse full faith and credit to the public acts of such other state and therein did not contravene Article 4, Section 1 of the Constitution of the United States.

VI. That the said Courts, respectively, erred in holding and deciding the said statute valid authority of and for franchise taxation in and by the State of New York upon the basis of the capital of relator invested and employed in the average number of its cars operated and used by it in the States of Massachusetts, New Jersey and Pennsylvania in the exercise of franchises granted by those states, respectively, and leased or remised by the grantees thereof to the said relator, and exercised by it in the carrying of commerce between points respectively within, and between points within and points without those respective states, and that therein and thereby the said statute did not impose burden upon or regulation of interstate and foreign commerce and did not impair the obligations of contracts pertaining to interstate and foreign commerce, and hence did not offend against the provisions of either Article 1, Section 8, or Article 1, Section 10 of the Constitution of the United States.

VII. That the said Court, respectively, erred in holding and deciding that franchise taxation imposed by the said Comptroller of the State of New York under the supposed authority of said statute, upon the basis of the capital of said relator invested
302 in the average number of its cars by it operated and used in the States of Massachusetts, New Jersey and Pennsylvania,

respectively in the exercise of franchises granted by those states, respectively, to corporations created thereby and domiciled therein, and by them leased to relator and by it exercised in commerce local to said respective states, as also in commerce between those respective states and other states, did not impair the obligations of the contracts inhering in, arising upon and pertaining to the grant, acceptance and use of the franchises granted by the said respective states, within their domain, respectively, and hence did not therein offend against the provisions of Article 1, Section 10 of the Constitution of the United States.

VIII. That the said Courts, respectively, erred in holding and deciding the said statute valid authority of and for franchise taxation upon the basis of the capital of the said relator invested and employed in the average number of its cars used wholly outside of the State of New York, in the operation of railroads situate in other states, owned by corporations created by and domiciled within such other respective states, and leased to and operated by the said relator under authority of the franchises of its said respective lessors, granted to them by the said states, respectively, and that such franchise tax did not impair the obligations of the said contracts of lease, and hence was not therein repugnant to Article 1, Section 10 of the Constitution of the United States.

IX. That the said Courts, respectively, erred in holding and deciding the said statute valid authority of and for and the exercise thereunder of said authority the valid imposition of franchise taxation upon the basis of the capital of the said relator invested and employed in the average number of its passenger, freight,
303 baggage, mail and express cars employed and used by relator in the States of Massachusetts, New Jersey and Pennsylvania, respectively, upon lines of railroad situate in and built and owned by corporations chartered by and domiciled in said respective states, and leased by such corporations to and operated by the said relator, in the carrying of state and interstate commerce under and subject unto the franchise granted and regulation prescribed by such respective state wherein the said road is situate, and that such franchise tax did not transcend the territory and power of the jurisdiction of the State of New York and of its said Comptroller and did not deprive relator of its property or property rights without due process of law, and did not deny to relator the equal protection of the laws, and hence did not therein contravene the fourteenth amendment of the Constitution of the United States.

X. That the said Courts, respectively, erred in holding and deciding the said statute of the State of New York to be valid authority for, and the said authority of the Comptroller of the State of New York exercised thereunder to constitute valid imposition of, the said franchise tax imposed and computed upon the basis of the capital of the said relator invested and employed in the average number of its cars, which, having in obedience to the requirements of the laws of the United States passed out of the State of New York and out of the possession, custody and control of the said relator, were operated and used by railroad corporations created by other states upon their railroads there situate, under authority of franchises granted by such

other states, respectively, in common carrier transportation local to said respective states and between those and other states, and that such franchise tax thus computed and imposed did not con-
304 stitute a burden upon or regulation of commerce among the several states, and did not impair the obligations of the contracts under which in obedience to the laws of the United States the said relator transferred and surrendered, and the said respective foreign corporations in turn directly or remotely acquired possession and custody of and used the said cars of said relator, and did not impair the obligations of the contracts inhering in, arising upon and incident to the grant, acceptance and use in such other states of the franchises granted by them, respectively, and did not derogate from the dignity of such other respective states or refuse full faith and credit to the public acts thereof, or otherwise transcend the territory or power of the jurisdiction of the State of New York or of its said Comptroller, and hence that the said franchise tax thus computed and imposed did not offend against and was not violative of or repugnant to either Article 1, Section 8, or Article 1, Section 10, Article 4, Section 1, or the fourteenth amendment of the Constitution of the United States.

XI. That the said Courts, respectively, erred in holding and deciding the said statute of the State of New York to be valid authority for, and the said authority of the Comptroller of the State of New York exercised thereunder to constitute valid imposition of the said franchise tax computed and imposed upon the basis of the capital of the said relator invested and employed in the average number of its cars operated and used in the States of Massachusetts, New Jersey and Pennsylvania, respectively, upon lines of railroad situate therein, built, maintained and operated under authority of franchises granted by those respective states to and accepted by corporations created thereby, and domiciled therein, and under leases or grants of trackage rights of railroad and accompanying
305 franchise demised or let by the said owning corporations to the said relator, and thus operated and used in and about common carrier transportation local to the said states of Massachusetts, New Jersey and Pennsylvania, respectively, and between those respective states and other states of the United States and dominions foreign to the United States, and that such franchise tax thus computed and imposed did not constitute a burden upon or regulation of commerce among the several states or foreign commerce, or commerce within and domestic to such respective state, and did not impair the obligations of the contracts inhering in, arising upon and incident to the grant, acceptance and use in such respective States of Massachusetts, New Jersey and Pennsylvania of the franchises granted by them respectively, or of the contracts of lease and agreements of and for trackage rights whereby and whereunder the said owning corporations granted, demised and let the said property and property rights and franchises to relator and relator thus operated in the said respective states under authority thereof and of said franchises, and did not derogate from the dignity of such respective state or deny or refuse full faith and credit to the public

acts of such other respective state, or thus or otherwise transcend the territory or power of the jurisdiction of the State of New York or of its said Comptroller, and hence that the said franchise tax thus computed and imposed did not contravene or offend against and was not violative of or repugnant to either Article 1, Section 8, or Article 1, Section 10, Article 4, Section 1, or the fourteenth amendment of the Constitution of the United States.

XII. That the said Courts, respectively, erred in so holding and deciding as therein and thereby to uphold and sustain the
306 validity of the said statutory provisions and of the authority of the said Comptroller of the State of New York exercised thereunder in the said computation and imposition of the said franchise tax as not constituting a burden upon or regulation of commerce domestic to and within states other than the State of New York, as not constituting a burden upon or regulation of commerce among the several states or with foreign countries, as not impairing the obligations of contracts arising upon and pertaining to commerce within and domestic to states other than the State of New York, as not impairing the obligations of contracts arising upon or pertaining to commerce among the several states and with foreign countries, as not impairing the obligations of contracts arising upon and pertaining to the grant and acceptance and lease of franchises by and the exercise and use thereof within states other than the State of New York, as not derogatory to the dignity of a sister state, as not denying full faith and credit to the public acts of such other state, as not transcending the territory or power of the jurisdiction of the State of New York or of its said Comptroller, and as not depriving the said relator of its property or property rights without due process of law, and as not depriving relator of the equal protection of the laws, and hence denying to the said relator the relief, order and decree herein prayed for, and in rendering judgment against them for costs and disbursements in the said cause and proceeding.

XIII. That the said Courts, respectively, erred in holding and deciding in favor of the validity of the said statute of the State of New York, and the authority of the said Comptroller of the State
307 of New York by him exercised thereunder, and consequent thereupon that the said petitioners, plaintiffs in error, were disentitled to have and maintain their said cause and proceeding and to have the relief, order and decree therein and thereby prayed for.

XIV. That the said Courts, respectively, erred in holding and deciding in favor of the validity of the said statute of the State of New York and of the said authority exercised thereunder, whereby the said franchise tax was in manner aforesaid computed and imposed, as not repugnant to the Constitution of the United States, and consequent thereupon denying to said relator the relief, order and decree prayed for in its complaint in said cause.

XV. That the said Courts, respectively, erred in that their said respective final order and judgment were for and in favor of the said respondent, defendant in error, as Comptroller of the State of New York, when the same should have been for and in favor of the said petitioners.

The said petitioners, plaintiffs in error, pray judgment that the said final order and judgment aforesaid be in all things reversed, set aside and held for naught, and the said relator may be restored to all things which it has lost by occasion thereof.

IRA A. PLACE,
Attorney for Plaintiffs in Error.

THOMAS EMERY,
Of Counsel.

308 [Endorsed:] United States Supreme Court. The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, Plaintiffs in Error, against Otto Kelsey, as Comptroller of the State of New York, Defendant in Error. Assignment of Errors. (Tax of 1903.) Ira A. Place, Attorney for Plaintiffs in Error, Grand Central Station, Borough of Manhattan, New York City, N. Y.

309 *Petition for Writ of Error to the Court of Appeals of the State of New York.*

In the Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK, upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Plaintiffs in Error,

against

OTTO KELSEY, as Comptroller of the State of New York, Defendant in Error.

(Tax of 1903.)

To the Honorable Justices of the Supreme Court of the United States.

Come now the said petitioners The People of the State of New York upon the relation of The New York Central and Hudson River Railroad Company by their attorney, and as and by way of complaint of and against the said Otto Kelsey, as Comptroller of the State of New York, respondent, respectfully show to the Court:

That the said relator, The New York Central and Hudson River Railroad Company, was during all of the times mentioned in the record herein and is a domestic corporation of the State of New York, organized under the laws of and domiciled within that state, engaged in the business of a common carrier of persons and property between points respectively within that state, and between points respectively within either of the respective States of Massachusetts, New Jersey and Pennsylvania, and between points in either of the said respective states and points in either of the others thereof, and between
310 points in either of said states and points in other states and foreign countries, and between points in respective states other than the above, via and over routes extending through and over portions of one or more of the said respectively named states.

That by provision of the Tax Law of the State of New York, Section 180, the tax or license fee of and for domestic corporation organization, existence and capacity is imposed, exacted and paid once for all at the threshold of the vesting of corporate power; Section 182 thereof provides imposition of an annual franchise tax for and upon the exercise of domestic corporation franchises to be computed as therein provided upon the basis of the amount of corporate capital employed in said state within the tax year; and, Section 184 thereof provides imposition of an additional annual franchise tax to be computed upon the basis of the amount of corporate gross earnings therein within the tax year.

That during the year ending October 31, 1903, for and in respect of which the tax here in question was imposed and exacted, the said relator carried on its said business of a common carrier of persons and property in and by the operation of engines, cars and trains upon and over its owned and leased lines of railroad and lines of railroad upon and over which it had trackage rights, respectively, within the State of New York, and upon and over leased lines of railroad and lines of railroad upon and over which it had trackage rights, respectively, within the respective States of Massachusetts, New Jersey and Pensylvania, upon all whereof it thus carried persons and property locally between points within either of the respective states wherein portions of its operated lines of railroad were situate,
311 and between points in either of those respective states and points in other states.

That in and about the carrying on of said transportation business by the said relator large numbers of its cars, though composed of frequently and constantly changing individual cars, passed into or out of the said respective States of New York, Massachusetts, New Jersey and Pennsylvania in such wise that at all times a large average number, to wit, many hundreds of the cars of said relator were continuously situate, employed and operated in the States of Massachusetts, New Jersey and Pennsylvania, respectively, upon and over railroads there situate, and in so doing were thus operated in the right of and under authority of the franchises in that behalf granted by those respective states and subject unto the burdens imposed and regulations prescribed in and by the public acts, laws, rules and ordinances of the respective state, and political subdivision thereof, wherein the said portion of road was situate and the said transportation service performed.

That the major part of the said relator's said transportation business consisted of such transportation by it upon and over portions of its said operated lines of road of so much of through carriage of persons and property starting or consigned from points outside of some one of the respective States of New York, Massachusetts, New Jersey and Pennsylvania and destined to points within some one of said respective states, or vice versa, and persons and property starting or consigned from points respectively without either of said states, passing en route through some one or more thereof, and destined to points respectively without either thereof.

That inasmuch as the said transportation service thus performed

and rendered by the said relator consisted of operations within
312 the said States of Massachusetts, New Jersey and Pennsylvania respectively, they consisted of and inhered in the exercise of franchises granted by those states respectively to corporations created by and domiciled within the said states, respectively, which were thus exercised by relator under and in pursuance of contracts of and for leases of, and contracts of and for trackage rights upon and over railroads there situate, together with the franchise to maintain and operate the same, granted, remised and accorded by the said corporations created by said respective states to the said relator, and exercised and enjoyed by the said relator in and under authority of the rights of its respective lessors and under and in pursuance of and subject unto the burdens imposed and regulations prescribed by the public acts and laws of the said States of Massachusetts, New Jersey and Pennsylvania respectively.

That in and by the exercise and performance of the functions thus employed by the said relator in the respective States of Massachusetts, New Jersey and Pennsylvania the only such function which it thus exercised under authority of the State of New York was that of its corporate existence, capacity and powers, the tax whereon or wherefor is no part of the tax here in question.

That the said franchise thus exercised by the said relator in the respective States of Massachusetts, New Jersey and Pennsylvania in and about and in respect of the there operation of its trains and transportation of persons and property were solely those granted and accorded by and under authority of the said respective states wherein the said operations were carried on and conducted, and were altogether and only subject unto regulations prescribed and pro-
313 mulgated by authority of those respective states and by authority of the United States, and not at all by authority of the State of New York.

That if and so far as it was within the province and power of the State, as distinguished from the United States, to impose or exact burdens upon or to prescribe regulations for and concerning the exercise by relator of the said franchises of railroad maintenance, train operation and transportation of persons and property, the province and power thereof solely inhered in and pertained to the said respective States of Massachusetts, New Jersey or Pennsylvania wherein the said respective railroad was situate and the said franchises were exercised, and not in or to the said State of New York.

That in and about the said relator's train operations and transportation of persons and property upon and over its said operated lines of railroad in the said respective States of New York, Massachusetts, New Jersey and Pennsylvania, respectively, in obedience to the requirements of the laws of the United States respecting through transportation from one state to another of carload commodities without reloading or breaking of bulk, and otherwise in conformity with the methods generally observed and followed by common carrier railroad transportation companies within the United States, in the time last preceding and within the said tax year, large numbers of relator's cars of various kinds were from day to day transferred and delivered

from relator, and its said operated lines of railroad, in the respective States of New York, Massachusetts, New Jersey and Pennsylvania, to, and upon the railroads of and operated by, other common carrier railroad transportation companies foreign to and outside of the State of New York, whereby a large average number of relator's cars, consisting of more or less frequently changing individual cars,
314 were continuously and at any and all times out of the State of New York, and out of the possession, custody and use of the said relator, and in the meantime transferred and delivered, more or less frequently from one to another common carrier railroad transportation corporation, and by them employed outside of the State of New York in and about their mutual and respective transportation business, foreign to and entirely dissociated from the business of the said relator, and in such wise as rendered it impossible for the relator to know, be informed or make proof, what, if any, of the said cars, and the extent to which all or any thereof were employed in transportation business solely within or domestic to any state, or in transportation business between or among the several states, or between the United States and countries or dominions foreign thereto; all of which said employment was under authority of and in the exercise of franchises respectively granted by the respective State in which the respective portion of transportation service was performed and carried on, and none whereof were granted by the State of New York.

That all and singular the service performed and business carried on and conducted by the means and in the use of relator's said cars, as well in the instances of operation thereof by the said foreign corporations as also in the instances of the operation thereof by relator, as and when carried on and conducted within the bounds of either such respective state other than New York were thus rendered, carried on and conducted under and subject unto the public regulation in that behalf prescribed, and under the authority and protection in that behalf provided and afforded in and by and in pursuance of the public acts of the respective state within whose territorial bounds
315 each respective portion thereof transpired and occurred, save and except only as and wherein the said service and business were subject unto and governed by the constitution, laws and administration of the United States.

That subject only unto such exception of Federal control each such State other than the State of New York had and exercised the exclusive province of prescribing in and by its public acts all and singular the burdens and regulations which the portions of the said service and business conducted within its territorial limits should be subject unto; and it was not within the province of the State of New York to impose other or further burden or regulation upon or concerning either intra-state, interstate or foreign commerce or any part thereof carried on or conducted within the bounds of such other state even though such service was performed or such business was carried on and conducted by relator corporation created by and having its domicil in the State of New York, for that any and either such imposition of regulation or burden contravened the provisions of the Constitution of the United States in that it denied full faith and credit to

the public acts of such other state; deprived relator of the equal protection of the laws of the State of New York; deprived relator of the equal protection of the laws of each such other State; oppressed the local commerce of and thus and otherwise derogated from and inveighed against the dignity and sovereignty of each such other State; transcended the power of the jurisdiction of the State of New York, in and by imposition of its tax burdens upon property, business and avocation respectively having their situs outside the State of New York and therein constituted the taking of the property of relator without due process of law, and, oppressed the privilege, occu-
316 pation and business of interstate and foreign commerce in manner aforesaid exercised, carried on and conducted by relator in each of the respective States other than New York in which its said cars were as aforesaid operated and employed.

That the capital of the said relator invested and employed in the average number of the cars of the relator in manner aforesaid absent from and employed outside of the State of New York in and during the franchise tax year ending October 31, 1903, was in excess of the sum of $19,817,142.24, which said sum stood in such relation to the meantime total capital of said relator that in and by inclusion thereof as subject unto the franchise tax to be computed upon the basis of the relator's capital employed within the State of New York, the said franchise tax was augmented and enlarged in and by the sum of $13,864.48.

That the said Comptroller of the State of New York in and about the imposition and laying of the said franchise tax upon and against the said relator to be computed upon the basis of the capital of the said relator employed within the State of New York during the said tax year, and the said respective courts in and about their respective final orders and judgments of affirmance of the said tax, imposed and sustained the same computed upon the basis of and including all of the cars of the said relator, the large average numbers whereof were in manner aforesaid absent from and employed in state and interstate and foreign commerce outside of the State of New York.

And the said petitioners further respectfully show unto the Court and complain that in the said record and proceedings had in the above entitled action (Taxes of A. D. 1903), and also in the rendition of the final order and judgment in the same cause, in the Supreme Court of the State of New York, sitting in Albany County,
317 Third Judicial Department, at the Appellate Division, November Term thereof, A. D. 1905, to wit: November 14, 1905, as also in the final order and judgment of the Court of Appeals of the State of New York, to which last mentioned court the said cause was appealed by said petitioners, being the highest court of law and equity in said state, and the highest such court in which a decision could be had in such cause, to wit; on January 23d, A. D. 1906, affirming on appeal the said final order and judgment of the Supreme Court of the State of New York, in the said cause between the said The People of the State of New York upon the relation of The New York Central and Hudson River Railroad Company, petitioners and plaintiffs in error, and the said Otto Kelsey, as Comptroller of the State of New

York, respondent, and defendant in error, in each which Supreme Court and Court of Appeals, was drawn in question the validity of a statute of said state, and the validity of an authority exercised by the said Comptroller under said state, on the grounds that (1) they constituted a burden upon and regulation of commerce among the several states as carried on and conducted by the said relator and were thus repugnant to the commerce clause Article 1, Section 8, of the Constitution of the United States; (2) they impair the obligations of contracts of and with the said relator and were thus repugnant to Article 1, Section 10 of the Constitution of the United States; (3) they deprive the said relator of its property and property rights without due process of law and deny to it the equal protection of the laws, and were thus repugnant to the provisions of the fourteenth amendment of the Constitution of the United States, and (4) they deny and refuse to give full faith and credit to the public acts of such other respective states wherein relator's said cars were as aforesaid employed,
318 and were therein violative of Article 4, Section 1, of the Constitution of the United States, and the decision, final order and judgment of each thereof, the said Supreme Court and the said Court of Appeals, *was* in favor of such their validity; and that the said decision, final order and judgment of affirmance of the said Court of Appeals of the State of New York, together with the record and proceedings in said cause now remain in the said Court of Appeals of the State of New York before the justices thereof; in all whereof manifest error hath happened to the prejudice and damage of the said relator, The New York Central and Hudson River Railroad Company.

Wherefore, the said The People of the State of New York upon the relation of The New York Central and Hudson River Railroad Company, petitioners and plaintiffs in error, pray for the allowance of a writ of error, and for such other and further orders and process as may cause the record and proceedings aforesaid, with all things concerning the same, to be sent to the Supreme Court of the United States, that upon final hearing hereof the said error be corrected, and such other and further proceeding be ordered and had as according to law should be done.

And your petitioners will ever pray.

Dated January 24th, 1906.

IRA A. PLACE,
Attorney for Petitioners, Plaintiffs in Error.

Room 417, Grand Central Station, Borough of Manhattan, New York City, N. Y.

THOMAS EMERY, *Of Counsel.*

319 STATE OF NEW YORK, *County of New York, ss:*

Edward L. Rossiter, being duly sworn, says, that he is an officer of The New York Central and Hudson River Railroad Company the petitioner herein, to wit, the Treasurer thereof; that the foregoing petition is true to the best of his knowledge and belief.

E. L. ROSSITER.

Sworn to before me this 24th day of January, 1906.
GEO. T. BROWN,
Notary Public, Westchester County.

Certificate filed in N. Y. County.

Allowed this 31 day of January, 1906.
EDGAR M. CULLEN,
Chief Judge of the Court of Appeals of the State of New York.

320 [Endorsed:] United States Supreme Court. The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, Plaintiffs in Error, against Otto Kelsey, as Comptroller of the State of New York, Defendant in Error. Petition for Writ of Error. (Tax of 1903.) Ira A. Place, Attorney for Plaintiffs in Error, Grand Central Station, Borough of Manhattan, New York City, N. Y.

321 United States Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant,
against
OTTO KELSEY, as Comptroller, etc., Respondent.

(Tax of 1903.)

Know all men by these presents, That we, The People of the State of New York *ex rel.* The New York Central and Hudson River Railroad Company, as principal, and the National Surety Company having an office and principal place of business at #346 Broadway, Borough of Manhattan, City of New York, as surety, are held and firmly bound unto Otto Kelsey, as Comptroller, etc., above-named, in the sum of Five hundred ($500.) Dollars to be paid to the said Otto Kelsey, as Comptroller, etc., his executors or administrators, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated the 24th day of January, 1906.

Whereas, the above-named Appellant has sued out a Writ of Error to the United States Supreme Court to reverse the judgment in the above entitled case by the Court of Appeals of the State of New York.

Now, therefore, the condition of this obligation is such that if the above-named Appellant shall prosecute said writ to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void otherwise to remain in full force and virtue.

[CORPORATE SEAL.]
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
By W. H. NEWMAN, *President.*

Attest:
[L. S.] D. W. PARDEE, *Secretary.*

NATIONAL SURETY COMPANY,
By JOEL RATHBONE, *Res. Vice-President.*

Attest:
RICHARD U. MORIARTY, *Res. Asst.-Secretary.*

322 STATE OF NEW YORK, *County of New York, ss:*

On the 24th day of January in the year 1906, before me personally came William H. Newman, to me known, who being by me duly sworn did depose and say, that he resides in the City of New York; that he is the President of The New York Central and Hudson River Railroad Company, the corporation described in and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by authority of the Board of Directors of said Corporation, and that he signed his name thereto by like authority.

[SEAL.] ALBERT B. QUENCER,
Notary Public, N. Y. County, N. Y. (No. 1).

323 STATE OF NEW YORK, *County of New York, ss:*

On this 24th day of Jan. 1906, before me personally appeared Joel Rathbone. Res. Vice-President of the National Surety Company, with whom I am personally acquainted, who being by me duly sworn, said that he resides in the County of New York; that he is the Res. Vice-President of the National Surety Company, the corporation described in and which executed the within instrument; that he knows the corporate seal of said Company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company, and that he signed said instrument as Res. Vice-President of said Company by like authority; and that the liabilities of said Company do not exceed its assets, as ascertained in the manner provided in Section 3, Chapter 720 of New York Session Laws of 1893. And the said Joel Rathbone further said that he is acquainted with Richard U. Moriarty, and knows him to be the Res. Asst. Secretary of said Company; that the signature of the said Richard Moriarty, subscribed to the said instrument is in the genuine handwriting of the said Richard U. Moriarty, and was thereto subscribed by the like order of the said Board of Directors and in the presence of him, the said Joel Rathbone, Res. Vice-President.

MOLLIE SCHOENBRUN,
Notary Public for the County of N. Y., No. 347.

Certificate filed in Kings, Westchester, Richmond & Queens Counties.

Copy of By-Law.

Be it Remembered, That at a regular meeting of the Board of Directors of the National Surety Company, duly called and held on the 6th day of February, 1900, a quorum being present, the following By-Law was adopted:

"ARTICLE XIII. SEC. 1.—*Signatures Required.*—All bonds, recognizances, contracts of indemnity and other writings obligatory in the nature thereof, shall be signed by the President, the Vice

"President, the Second Vice-President, a Resident Vice-President, or "an attorney in fact, and, except when signed by an attorney in "fact, shall have the seal of the Company affixed thereto, duly at- "tested by the Secretary, an Assistant Secretary or a Resident Assist- "ant Secretary. The Vice-President, Second Vice-President and "Resident Vice-Presidents shall each have authority to sign such in- "struments whether the President be absent or incapacitated or not; "and the Assistant Secretaries and Resident Assistant Secretaries "shall each have authority to seal and attest such instruments, "whether the Secretary be absent or incapacitated or not. All such "instruments executed as herein provided shall be as binding upon "the Company as if the same were signed by the President, duly "sealed and attested by the Secretary."

STATE OF NEW YORK, *County of New York, ss:*

I, Richard U. Moriarty, Res. Asst. Secretary of the National Surety Company, have compared the foregoing copy of By-Law with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original By-Law.

Given under my hand and seal of the Company this 24 day of Jan. 1906.

[L. S.] RICHARD U. MORIARTY,
Res. Ass't Secretary.

Approved by
EDGAR M. CULLEN,
Chief Judge of the Court of Appeals.

324 [Endorsed:] United States Supreme Court. The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, Plaintiffs in Error, against Otto Kelsey, as Comptroller of the State of New York, Defendant in Error. Copy. Undertaking. (Tax of 1903.) Ira A. Place, Attorney for Plaintiffs in Error, Grand Central Station, Borough of Manhattan, New York City, N. Y.

325 The original of the foregoing supersedeas bond was lodged with the Clerk of the Court of Appeals of the State of New York, on February 2nd, 1906, and the following endorsement made thereon: Bond. Filed February 2nd, 1906—W. H. Shankland, Clerk of the Court of Appeals.

326 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of New York, possessors of the return and record in the action in which The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company are Plaintiffs, and Otto Kelsey, as Comptroller of the State of New York, is Defendand, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea in the Court of Appeals of the State of New York, wherein final judgment upon return from the Supreme Court of the State of New York was rendered January 23d, 1906, that being the highest Court of law and equity of the said State in which a decision could be had in the suit or action between The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, Plaintiffs in Error, and Otto Kelsey, as Comptroller of the State of New York, Defendant in Error, and which is now before you or some of you in said Court; wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity, a manifest error hath happened to the great damage of the said, The New York Central and Hudson River Railroad Company, as by its complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do
327 command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the said Supreme Court, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the first day of February in the year of our Lord one thousand nine hundred and six, and of our Independence the one hundred and thirtieth.

[Seal of the U. S. Circuit Court, Northern District N. Y.]

W. S. DOOLITTLE,
Clerk of the United States Circuit Court
for the Northern District of New York.

Allowed by
EDGAR M. CULLEN,
Chief Judge of the Court of Appeals
of the State of New York.

328 [Endorsed:] United States Supreme Court. The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company Plaintiffs in Error, against Otto Kelsey, as Comptroller of the State of New York, Defendant in Error. Writ of Error. (Tax of 1903.) Ira A. Place, Attorney for Plaintiffs in Error, Grand Central Station, Borough of Manhattan, New York City, N. Y.

329 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To Otto Kelsey, as Comptroller of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Court of Appeals of the State of New York, wherein The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 31 day of Jan'y in the year of our Lord one thousand nine hundred and six.

EDGAR M. CULLEN,
Chief Judge of the Court of Appeals of the State of New York.

330 [Endorsed:] United States Supreme Court. The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, Plaintiffs in Error, against Otto Kelsey, as Comptroller of the State of New York, Defendant in Error. Citation. (Tax of 1903.) Ira A. Place, Attorney for Plaintiffs in Error, Grand Central Station, Borough of Manhattan, New York City, N. Y. Due service of a copy of within citation is admitted this 5th day of February, 1906. Julius M. Mayer, Att'y for Def't in Error.

331 Court of Appeals of New York, on Appeal from the A
Division, Third Department.

THE PEOPLE OF THE STATE OF NEW YORK, upon the Rel
THE NEW YORK CENTRAL AND HUDSON RIVER RAILRO
PANY, Plaintiffs in Error,

vs.

OTTO KELSEY, as Comptroller of the State of New Yo

(Tax of 1903.)

Papers on Appeal.

Ira A. Place, attorney for relator and appellant.
Julius M. Mayer, Attorney-General, attorney for respondent

STATE OF NEW YORK:

Court of Appeals, Clerk's Office.

To the Judges of the United States Supreme Court:

The return of the judges of the Court of Appeals of the New York, in pursuance to the writ of error in the case People of the State of New York, upon the relation of The N Central and Hudson River Railroad Company, appellant, Kelsey, as Comptroller of the State of New York, respondent of 1903, is contained in the papers and proceedings hereto

In witness whereof I have hereunto set my hand and af official seal at the city of Albany this 2nd day of February,

[Seal Court of Appeals, State of New York.]

W. H. SHANKLAND,
Clerk of the Court of Appeals o
the State of New

Endorsed on cover: File No. 20,089. New York cou peals. Term No. 587. The People of the State of New Yo the relation of The New York Central & Hudson River Company, plaintiff in error, *vs.* Otto Kelsey, as comptroll State of New York. Filed February 7th, 1906. File No

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 588.

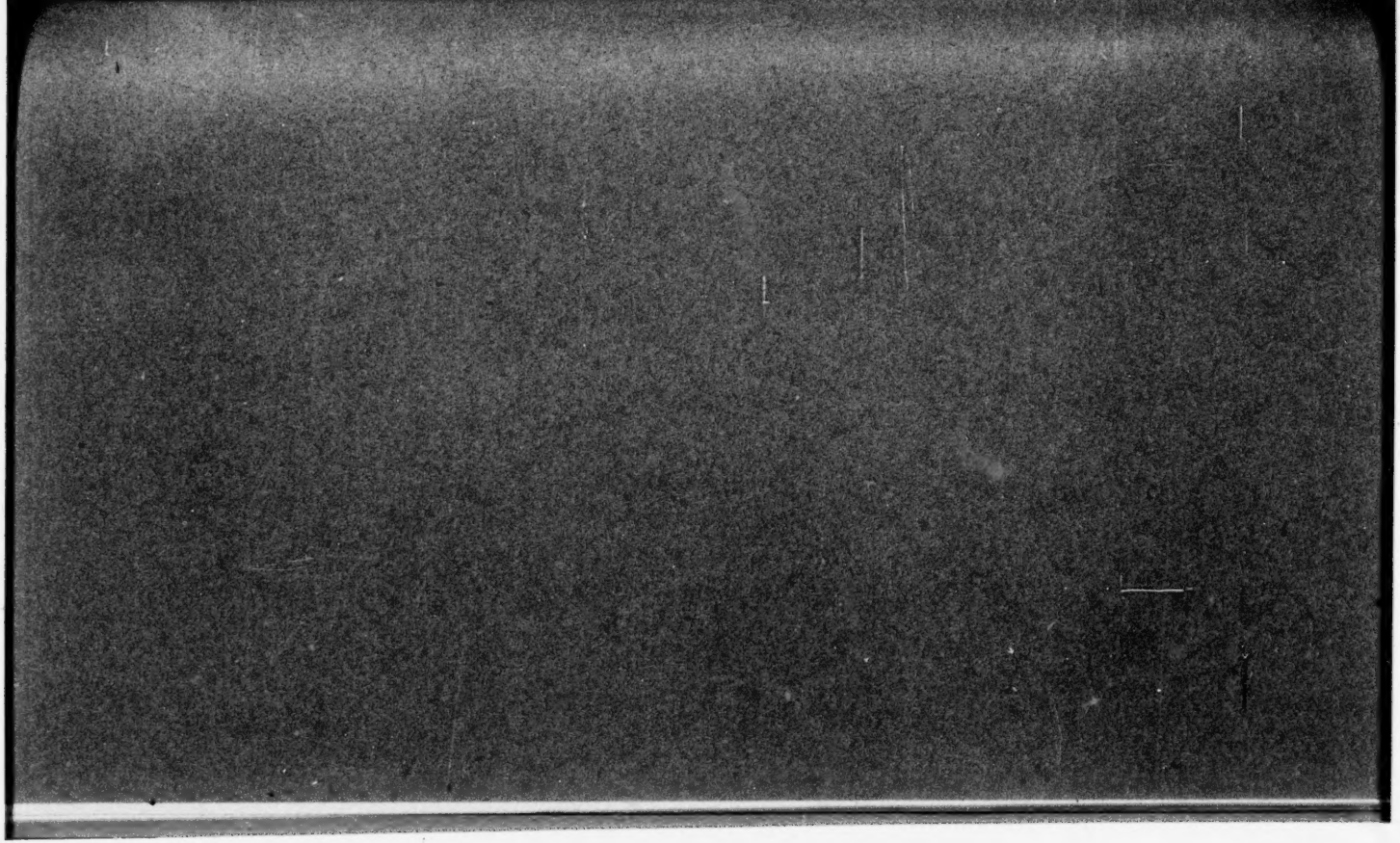
THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

ROBERT ROSEBOOM, AS COMPTROLLER OF THE STATE OF NEW YORK.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

(28,000)



(20,090.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 588.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

OTTO KELSEY, AS COMPTROLLER OF THE STATE OF NEW YORK.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 20, 1906.

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In the Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

against

OTTO KELSEY, as Comptroller of the State of New York.

Papers on Appeal from Order.

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Ira A. Place, Attorney for Appellant, Grand Central Station, Borough of Manhattan, N. Y. City, N. Y.
Julius M. Mayer, Attorney-General, Attorney for Respondent, Capitol, Albany, N. Y.

1 *Notice of Application for an Order for a Writ of Certiorari and for Writ.*

Supreme Court, Albany County.

Tax of 1904.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

against

OTTO KELSEY, as Comptroller of the State of New York.

SIR: Please take notice that a motion will be made by and on behalf of The New York Central and Hudson River Railroad Company, at a Special Term of the Supreme Court in and for the County of Albany, to be held at the City Hall in the City of Albany, N. Y., on the 30th day of September, 1905, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order for a writ of certiorari, and also for a writ of certiorari, to be directed to you, to review the determination of the Comptroller of the State of New York, dated September 11, 1905, a copy of
2 which is hereto annexed, to be returnable according to law, and for such other and further relief as may be proper.

Dated New York, September 18, 1905.

Yours, etc.,
IRA A. PLACE,
Attorney for Applicant, The New York Central and Hudson River Railroad Company.

Room 417, Grand Central Station, Borough of Manhattan, New York City, N. Y.

To Hon. Otto Kelsey, Comptroller of the State of New York, Albany, N. Y.

3 STATE OF NEW YORK:

COMPTROLLER'S OFFICE,
ALBANY, *Sept. 11th*, 1905.

In the Matter of the Application of THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY for a Revision of Taxes Assessed Against It, Under Chapter 908, Laws of 1896, and the Acts Amendatory Thereof.

An application having been made by the above-named New York Central & Hudson River Railroad Company for a revision and resettlement of the taxes assessed and determined against it by the Comptroller of the State of New York, for the one year ending October 31, 1904, and the said Comptroller having heard the proofs offered on behalf of the said New York Central & Hudson River Railroad Company, in support of said application, and after due consideration thereof, the Comptroller does hereby determine that the amount of capital stock of the New York Central & Hudson River Railroad Company employed by the New York Central & Hudson River Railroad Company within this State for the year ending October 31, 1904, including the value of its tangible assets, good will and franchises, was $112,588,111.73, and the assessment
4 heretofore made against the said New York Central & Hudson River Railroad Company, for the sum of one hundred sixty-nine thousand four hundred fifty-three and 74/100 dollars, should be revised to the sum of one hundred sixty-eight thousand eight hundred eighty-two and 17/100 dollars; which said sum of one hundred sixty-eight thousand eight hundred eighty-two and 17/100 dollars is hereby determined as the amount which said New York Central & Hudson River Railroad Company was liable to pay under the provisions of Chapter 908, Laws of 1896, and the acts amendatory thereof, for the one year ending October 31, 1904.

OTTO KELSEY, *Comptroller.*

5 *Petition for Writ.*

Supreme Court, Albany County.

(Tax of 1904.)

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

against

OTTO KELSEY, as Comptroller of the State of New York.

To the Supreme Court of the State of New York:

The petition of The New York Central and Hudson River Railroad Company respectfully shows:

I. This petitioner, The New York Central and Hudson River Railroad Company, is a domestic railroad corporation, having but

one kind of capital stock, organized and existing under the Laws of the State of New York, for steam surface railroad purposes, and is engaged in operating certain railroads owned or leased in the State of New York and certain railroads leased in other States, and was such railroad corporation and thus engaged during the year ending October 31, 1904, and therein as a common carrier for hire transacting the business of the transportation of persons and property, and that thereby and therein a part of its capital was employed in this State, and that continuously during the said tax year a part of its capital was thus employed outside of and not employed within the State of New York.

6 II. The defendant, Otto Kelsey is and has been since November 12, 1903, the Comptroller of the State of New York.

III. That on or about November fifteenth, 1904, this petitioner duly made a written report to the Comptroller of the State of New York, as required by Subdivision 1, of Section 189 of the Tax Law of the State of New York, being Chapter 908 of the Laws of 1896 of the State of New York, and the Acts amendatory thereof; a full and true copy of which said report is hereto annexed, marked Exhibit One, and made a part hereof.

IV. That the said report set forth and showed the condition of this petitioner at the close of its business on October 31st preceding, and stated the amount of its authorized capital stock to be $150,000,000, of which there was issued, paid up and outstanding during the said tax year the amount of $132,250,000, and no more, and that the average value of the said capital stock during the said tax year was $124.6875 per share, thus showing that the value of its entire amount of issued capital stock was $164,899,218.75 and no more; that the date of the payment of each dividend declared by it during the year ending with said 31st day of October was as follows: January 15th, April 15th, July 15th, October 15th, 1904; that the aggregate rate per centum of the said dividends was five per centum; that such dividends amounted to less than six per centum on the par value of the capital stock of this petitioner; that the entire amount of the capital or assets of such corporation, this petitioner, wheresoever employed in and during the said tax year amounted to the sum of $390,314,019.79, and no more, of which capital or assets $247,435,542.58 was the amount employed by such corpora-

7 tion, this petitioner, within this State during the year ending said October 31, 1904, and that the amount of the said capital and assets employed by such corporation, this petitioner, outside of the State of New York during such year was $142,878,477.21, and that, therefore, from November 1, 1903, to October 31, 1904, both inclusive, $104,536,157.03 was the value of such portion of the capital stock of such corporation, this petitioner, as bears the same relation to the value of all thereof as the amount of its capital and assets employed within this State during the said tax year bears to the entire capital and assets of the corporation.

V. That subsequent to the said 15th day of November, 1904, to wit, on or about December 20th, 1904, the said Comptroller audited

and stated the account for the taxes to be paid by this petitioner under Section 182 of the Tax Law, and sent notice thereof to this petitioner.

VI. That the account so audited and stated was in the words and figures following, to wit:

"COMPTROLLER'S OFFICE, ALBANY, N. Y.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD CO.

c/o E. L. ROSSITER, Treas.

GRAND CENTRAL STATION, N. Y. C.

JOHN CARSTENSEN, Comp't.

In account with State of New York, *Dr.*

For Tax on Franchise or Business, based on Value of Capital Stock employed in New York State, per Chapter 908, Laws of 1896, and acts amendatory thereof, for the year ending October 31, 1904, as per report filed.

Appraised Value of Capital Stock.....	$112,969,156.75
Tax 1½ Mills.....	169,453.74

8 VII. That on or about the 9th day of March, 1905, and within one year from the time that the said account had been audited and stated, and notice thereof sent to this petitioner, this petitioner applied to the said Comptroller to revise and readjust the said account and to have said account resettled by striking therefrom, or by crediting to the account of this petitioner, the sum of $12,649.50; that the said application was made by written petition, duly verified on or about the 9th day of March, 1905, and entitled "In the Matter of the Application of The New York Central and Hudson River Railroad Company for a Revision and Readjustment of the Account heretofore audited and stated by the Comptroller of the State of New York for Taxes, under Section 182 of the Tax Law, for the year ending October 31, 1904;" a full and true copy of which said petition and application is hereto attached marked Exhibit Two and by reference made a part hereof.

That thereafter, to wit, on or about the 28th day of March, 1905, the said Comptroller announced and informed said petitioner that as soon as he reasonably could he would fix a date upon which the said application could be heard, and consequently, to-wit, on May 27, 1905, fixed the 6th day of June, 1905, as the day upon which the petitioner might be heard upon such application; that on the said 6th day of June, 1905, this petitioner duly appeared by its counsel before the Honorable Clark H. Timerman, the Deputy Comptroller, representing the said Comptroller, and gave testimony in support of said application; that upon said hearing it appeared

that the entire amount of the capital of said corporation, this petitioner, was of the value and sum of $390,314,019.79, of which the amount of $247,435,542.58 and no more constituted its capital employed within this State during said tax year, and $142,878,477.21 was the amount of its capital employed outside of this State during said tax year; that the movable equipment of the said petitioner during the said tax year included passenger, mail and express cars of the value of $6,407,085.11, of which 81.99 per cent., or $5,253,169.08 and no more was the average portion thereof employed within the State of New York, and 18.01 per cent., or $1,153,916.03, was the average portion thereof which was continuously and at all times during the said tax year employed outside of and not within the State of New York, and that said petitioner's movable equipment also included freight cars of the total value of $29,045,363.78, of which 35.25 per cent., or $10,238,490.73 and no more was the average portion of the said total freight car equipment which was during the said tax year employed within the State of New York, and that 64.75%, or $18,896,873.05, was the average portion of petitioner's said total freight car equipment which was continuously and at all times during the said tax year employed outside of and not within the State of New York; that petitioner's said equipment and the capital invested therein, as and when in manner aforesaid used and employed outside of this State, whether by this petitioner or by other persons or corporations, were so used and employed solely and exclusively under authority of and in the exercise of corporate franchises granted to corporations of its or their creation by the respective states and territories and foreign dominions within whose territorial jurisdiction the said use and employment were had and conducted and not in the use or exercise of any franchise granted by or taxable in the State of New York, and all in and about the rendering and performance of the common carrier service of the transportation of persons and commodities between points of shipment and points of destination, respectively, within individual states, territories and dominions other than the State of New York, and between points of shipment within the State of New York and points of destination in states and territories other than New York and in foreign dominions, and *vice versa*, and between points of shipment and points of destination and via routes altogether outside of the State of New York, and were thus used and employed in and about transportation local to individual states other than the State of New York and transportation constituting and pertaining to interstate commerce and foreign commerce all in such wise as did and does render it impossible for said petitioner to be informed or state the measure of such transportation employment constituting or pertaining to commerce local to any one or more individual states, or the measure thereof constituting or pertaining to interstate or foreign commerce, by means whereof to state or compute the amount of said assets or capital used or employed in either thereof, as distinguished or distinguishable from the other; and further that the average value of its capital stock during said tax

year was $124.6875 per share, showing the average value of it
$132,250,000 of capital stock during said tax year to have been th
sum of $164,899,218.75 and no more, of which $104,536,157.03 w
such portion of the value of the capital stock of such corporatio
this petitioner, as the amount of its capital employed within th
State bore to the entire capital of said corporation; that thereafte
the said Comptroller made his determination, and sent writte
notice of his determination upon the said application, to the appl
cant, this petitioner, the said determination being as follows:

11 "STATE OF NEW YORK, COMPTROLLER'S OFFICE,
ALBANY, *Sept.* 11*th*, 1905.

In the Matter of the Application of NEW YORK CENTRAL AND HU
SON RIVER RAILROAD COMPANY for a Revision of Taxes Assess
against it under Chapter 908, Laws of 1896, and the Acts Amen
atory Thereof.

An application having been made by the above-named New Yo
Central & Hudson River Railroad Company for a revision and
settlement of the taxes assessed and determined against it by
Comptroller of the State of New York, for the one year ending
31, 1904, and the said Comptroller having heard the proofs offe
on behalf of the said New York Central & Hudson River Railr
Company, in support of said application, and after due considerat
thereof, the Comptroller does hereby determine that the amount
capital stock of the New York Central & Hudson River Railr
Company employed by the New York Central & Hudson River R
road Co. within this state for the year ending October 31, 1904,
cluding the value of its tangible assets, good will and franchi
was $112,588,111.73, and the assessment heretofore made against
said New York Central & Hudson River Railroad Company, for
sum of One Hundred Sixty-nine Thousand Four Hund
12 Fifty-three and 74/100 dollars, should be revised to the
of One Hundred Sixty-eight Thousand Eight Hun
Eighty-two and 17/100 dollars; which said sum of One Hun
Sixty-eight Thousand Eight Hundred Eighty-two and 17/100
lars is hereby determined as the amount which said New York
tral & Hudson River Railroad Company was liable to pay under
provisions of Chapter 908, Laws of 1896, and the acts amenda
thereof for the one year ending October 31, 1904.

OTTO KELSEY, *Comptroller*

VIII. That in and by his said determination upon the said app
tion and resettlement and readjustment of the said tax at and
the sum of $168,882.17, the said Comptroller computed the sa
one and one-half mills upon each dollar of a valuatio
$112,588,111.73; that the said valuation of $112,588,111.73
the same relation and proportion to $164,899,218.75, the av
value of the entire capital stock of such corporation, this petiti
during said tax year, as the amount of $266,494,400.66 be
$390,314,019.79, the amount of the entire capital of such co

tion, this petitioner; that the said amount of $266,494,400.66 included and embraced $19,058.08, being a part of and so much of $19,960,789.08, the amount and value of the average portion of the rolling stock of said corporation, this petitioner, which was proven before the said Comptroller to have been continuously employed outside of this State during the said tax year; that this petitioner then insisted, and ever since has insisted and now insists, that the said tax of $168,882.17 upon the said $112,588,111.73 valuation of its said capital stock was er-

13 roneously and unlawfully assessed or imposed and payment thereof, could not and cannot be lawfully demanded, and that the average portion of the average value of the capital stock of such corporation, this petitioner, throughout the said year which bore the same relation to the average value of the entire capital stock as the amount of capital employed within this State bore to the entire capital of the corporation, was $104,536,157.03 and no more; and that upon that sum only could such taxes be levied or imposed at the rate of one and one-half mills, amounting to $156,804.24 and no more, and that there should be such resettlement of said account as would result in striking therefrom or crediting to the account of said petitioner any and all excess of that sum; and then insisted and has ever since insisted and now insists that such portion of the value of the capital stock of the said corporation, this petitioner, as bore the same relation to the total value of its entire capital stock during said tax year as the amount and value of the average portion of its rolling stock continuously employed outside of this State during said tax year, bore to its entire capital wheresoever employed, during said year, did not nor did any part thereof constitute any part of the amount of its capital stock employed within this State, and that no tax could be lawfully computed, assessed or imposed upon the basis of such said portion of its capital stock; and that whatsoever sum of tax was computed, assessed or imposed upon the basis of such said portion of its said capital stock should be either stricken off or credited to the account of said corporation, this petitioner; that the basis of computation of the said tax as resettled and readjusted by the said Comptroller was as follows:

x: 164,899,218.75 : : 266,494,400.66 : 390,314,019.79.

14 In this statement x=$112,588,111.73, and the tax thereon at 1½ mills is $168,882.17.

That the deduction from the said $266,494,400.66 of the $19,058,858.08, being a part of and so much of $19,960,789.08, the amount and value of the average portion of the rolling stock of said corporation, this petitioner, proven before the said Comptroller to have been continuously employed outside of this State during the said tax year, shows $247,435,542.58 and no more as being the amount and value of the capital of said corporation, this petitioner, employed within this State during said tax year; that thus corrected the statement is as follows:

x: 164,899,218.75 : : 247,435,542.58 : 390,314,019.79.

In this statement x=$104,536,157.03, and the tax thereon at 1½ mills is $156,804.24, thus showing the said corporation, this petitioner, entitled to further resettlement of the tax by striking therefrom or crediting to this petitioner's account the further sum of $12,077.93.

IX. That taxation in and by the State of New York, for and upon and in respect of corporate creation, existence and capacity, for and during the designated term of corporate life, is by and under the law of the State of New York computed upon the basis of the amount of the authorized capital stock, and imposed, and paid, once for all, at the creation of the corporation, subject only to addition upon and in respect of subsequent increase of authorized capital stock.

That the tax here in question has relation to and is imposed in respect of the use and exercise of the corporate franchise granted by the State of New York, and as such, is at most, lawfully computable in respect of the use and exercise thereof within this State, and upon the basis of the value of that portion of the amount of petitioner's issued capital stock which has been employed within this State during the respective tax year.

That if and in so far as the enactments under color of which this tax is imposed purport to authorize taxation for or upon or in respect of the aforesaid use or exercise of franchises foreign to the State of New York, or computed upon the basis of capital thus in manner aforesaid used and employed within the territorial jurisdiction of other states, territories or foreign dominions in the use and exercise of, and under the authority of franchises granted by them or by the United States to corporations created by them, respectively, the said enactments are beyond the power and prerogative of the State of New York to prescribe and enforce and are violative of and contravene the constitution, laws and treaties of the United States in that they deprive petitioner of the equal protection of the laws; also, in that they constitute the taking of property without due process of law; also, in that they constitute a regulation of, interference with and a burden upon interstate commerce and foreign commerce; also, in that they impugn the dignity and sovereignty of the United States and of sister states and of foreign dominions; also, in that they impair the obligations of the contracts arising upon and inhering in the grant to and acceptance by the corporations the lessors and licensors of said petitioner of the franchises by it as lessee and licensee used and exercised in respective states, territories and dominions other than and foreign to the State of New York; also, in that they impair the obligations of the contracts of lease of trackage right and license respectively, under and by virtue of which petitioner uses and exercises in respective states and territories other than the State of New York and in foreign dominions the franchises granted by them respectively to the lessors and licensors of said petitioner; also, in that they impair the obligations of the contracts, express and implied, under which petitioner is required to and does order, direct and permit or order, direct or permit its movable equipment to pass to and remain in the custody and subject to the control of other corporations and be by them con-

trolled and used in and about the transportation of persons and property upon their roads in other states and territories and foreign dominions under authority of and in the use and exercise of franchises granted by them respectively; also, in that the said enactments, and the judgments of the officers and tribunals in and of the State of New York sustaining and administering them, in and by imposing and exacting payment to the State of New York of a franchise tax computed upon the basis of the capital of said petitioner employed within the territorial jurisdiction of other respective States, in the use and exercise of franchises granted by them, respectively, deny and refuse to give "to the public acts" of said other respective States, by and under which the said franchises are granted, and the use and exercise thereof authorized and regulated, the "full faith and credit" force and effect which the said public acts are entitled to have, and do have, in the respective States whose acts they are, by reason whereof the said petitioner alleges that the said sum of $12,077.93, the purported tax of one and one-half mills upon $8,051,954.70 in excess of $104,536,157.03, the value of the amount of $83,838,521.93 the par value of its capital stock employed within the State of New York, is erroneously and unlawfully as-
17 sessed and imposed, and that payment thereof should not have been demanded, and could not and cannot be lawfully demanded, and is wholly and altogether without foundation or authority of law.

X. That heretofore this petitioner duly deposited with the Treasurer of the State of New York the full amount of the taxes, percentage, interest and other charges audited and stated in the said account, and duly filed an undertaking with the said Comptroller in an amount and with sureties approved by a Justice of the Supreme Court of the State of New York, to the effect that if the said writ is dismissed, or the said determination is confirmed, this petitioner will pay any and all charges and costs which may accrue against it in the prosecution of the writ, including costs of all appeals, a copy of such undertaking being hereto annexed, and marked "Exhibit Three."

XI. That your petitioner is aggrieved by the said determination of the said Comptroller. That no previous application for this writ has been made to any Court or Judge.

Wherefore, your petitioner, desiring to review both upon the law and the facts said determination of the said Comptroller, upon such application made to him by your petitioner for a revision and resettlement of so much of the said account, assessment and tax hereinabove set forth as embraces and is upon and in respect of such part of and so much of the value of its capital stock as bears the same relation to all thereof as the value of the average amount of its rolling stock equipment in manner aforesaid continuously em-
ployed outside of the State of New York during the said tax
18 year ending October 31, 1904, bears to the total value of its entire capital wheresoever employed during the said tax year, prays that a writ of certiorari may issue out of the Supreme Court of the State of New York, directed to the said Comptroller of the State

of New York, commanding the said Comptroller to certify and return at the office of the Clerk of Albany County all and singular the evidence before him on such application, and all the papers and proofs upon the original statement of such account, and all the proceedings thereon and all his decisions and actions in the premises, with all the evidence, documents, reports, records and papers relating thereto in his possession or under his control, submitted to or considered by him, concerning the said account and the grounds for his refusal to revise and readjust the same, in and regarding the particulars hereinabove set forth, to the end that his said decisions and determinations may be reviewed and the said original and resettled account corrected and restated, and that this petitioner have such other and further relief as may be proper.

Dated New York, September 26th, 1905.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
By E. V. W. ROSSITER, *Vice-President.*

IRA A. PLACE,
Attorney for Petitioner, Grand Central Station, Borough of Manhattan, New York City, N. Y.

19 STATE OF NEW YORK, *County of New York, ss:*

Edward L. Rossiter, being duly sworn, says: That he is an officer of the New York Central and Hudson River Railroad Company, the petitioner above named, to wit, the treasurer thereof; that the foregoing petition is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

E. L. ROSSITER.

Sworn to before me this 26th day of September, 1905.

GEO. T. BROWN,
Notary Public, Westchester County.

Certificate filed in N. Y. County.

20 EXHIBIT ONE.

Report of the New York Central and Hudson River Railroad Company for the year ending October 31, 1904, made pursuant to provisions of Sec. 182, Chapter 908, Laws of 1896, and acts amendatory thereof.

(Give post-office address of Company, Street and No.)

GRAND CENTRAL STATION, NEW YORK,
Dec. 17th, 1904.

To the Comptroller of the State of New York:

Agreeably to law, as Treasurer of the above Company, I make the following report, viz.:

1. This company began business in the State of New York in the month of November, 1869.
2. The last report made by this Company to the Comptroller of the State of New York under the provisions of the above act was made for the year ending October 31st, 1903.
3. Value of Real Estate and of interest or interests in real property in New York State, and where situated. Cannot give.
4. Organized under the laws of the State of New York.
5. Date of Organization of the Company, November 1st, 1869.
6. Total authorized Capital of Company (authorized by stockholders)..... $150,000,000.00
7. Whole number of shares of stock authorized, 1,500,000.
8. Number of shares of stock issued 1,322,500.
9. Par value of each share..... $100.00
10. Amount paid into the Treasury of the Company on each share..... $100.00

21 11. *a.* Amount of Capital paid in cash or property .....
b. Amount of Capital paid in good will $132,250,000.00
c. Amount of Capital paid in patents or copyrights.....

12. Amount of Capital upon which dividends were declared..... $132,250,000.00
13. Date of each dividend paid, Jan. 15th, April 15th, July 15th, & Oct. 15th.
14. Amount of each dividend paid $1,653,125.00.
15. Rate per cent. per annum of dividends, 5%.
16. The business transacted by this Company in the State of New York for the year ending October 31st, 1904, was as follows, viz: (Give nature of business and how carried on.)
Transportation.
17. And such business was carried on at the following named place or places: (Give Street and number.)
Numerous places.

18. Capital stock employed in New York State, $83,833,275.00.
(Preceding line need not be filled out by companies whose capital is all employed in this State.)
19. If not in New York State, where and how employed, permanently employed and invested outside of New York State.
20. What percentage of capital is employed in manufacturing in State of New York?
21. Highest price of sales of stock during the year aforesaid..136½.
22. Lowest price of sales of stock during the year aforesaid..112⅞.

(Signed) E. L. ROSSITER, *Treasurer.*

22 STATE OF NEW YORK, *County of New York, ss:*

On this 17th day of December, A. D. 1904, personally appeared before me, a notary public in and for the County of New York, E. L. Rossiter, treasurer of the above-named company, who, being duly sworn according to law, did depose and say, that the foregoing report is just, true and correct according as the accounts stand in the books of the company, and that it includes all dividends, whether in cash, stock, scrip or of any other character or description, declared by said company during the year ending on the thirty-first day of October, A. D. 1904.

(Signed) E. L. ROSSITER, *Treasurer.*

Sworn to and subscribed before me the day and year aforesaid.

(Signed) LOUIS BENDER,
[L. S.] *Notary Public.*

Remarks.

Of the total capital of this company, $19,960,789.08 in value of its equipment was employed outside of New York State. This amount is determined by taking such proportion of the value of passenger, mail and express cars as the wheelage outside of the state bears to the wheelage both in and out of the state and such proportion of the value of freight cars as the number of days cars were outside of the state bears to the total number of days (number of cars multiplied by 365 days) both in and out of the state.

23 *Recapitulation of Distribution of Assets.*

October 31st, 1904.

	In New York State.	Out of New York State.	Total.
Cost of road	$145,625,782.36	.....	$145,625,782.36
Cost of equipment	29,855,954.66	$19,960,789.08	49,816,743.74
Leased lines construction	7,742,438.20	5,937,121.45	13,679,559.65
Advances for other companies	1,084,292.68	.....	1,084,292.68
Stocks of other companies	13,929,365.55	115,546,242.36	129,475,607.91
Bonds of other companies	9,057,854.10	.....	9,057,854.10
Temporary assets	28,958,881.95	9,375.00	28,968,256.95
Ownership in other lines, real estate, etc	3,883,364.63	624,949 32	4,508,313.95
Investment % sinking fund for gold debentures of 1890	2,124,992.64	.....	2,124,992.64
Fuel and supplies	4,550,748.32	800,000.00	5,350,748.32
Items temporarily held in suspense	621,867.49	.....	621,867.49
	$247.435,542.58	$142,878,477.21	$390,314,019.79
	63.39 %	36.61 %	100.00 %

24 EXHIBIT TWO.

In the Matter of the Application of NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY for a Revision and Readjustment of the Account Heretofore Audited and Stated by the Comptroller of the State of New York for Taxes Under Section 182 of the Tax Law, for the Year Ending October 31, 1904.

To the Honorable Otto Kelsey, Comptroller of the State of New York:

The application of The New York Central and Hudson River Railroad Company respectfully shows:

1. That it is a railroad corporation duly organized and existing under the laws of the State of New York, and as such during the aforementioned tax year was engaged in operating certain railroads by it owned and leased in the State of New York, and certain railroads by it leased in other States, and therein as a common carrier for hire transacting the business of the transportation of persons and property, and that thereby and therein a part of its capital was employed in this State, and that continuously during the said tax year a part of its capital was employed outside of and not employed within the State of New York.

25 2. That on or about the 15th day of November, in the year 1904, it duly made a written report to the Comptroller of the State of New York as required by subdivision 1 of Section 189 of the Tax Law, such report being in the form prescribed by the said Comptroller of the State of New York; and that such report showed

the condition of the said company at the close of its business on October 31st preceding, and that in said report was stated the amount of its authorized capital stock, the amount thereof issued and outstanding, the date and rate per centum of dividend declared by it in each quarter of the year ending on the said October 31, 1904, the entire capital stock of the said corporation and the amount thereof employed in this State during the said tax year computed upon the basis in and by the said report set forth. That as set forth and shown in and by the said report the amount of the authorized capital stock of this company was $150,000,000, of which there was issued, paid up and outstanding from November 1, 1903, to October 31, 1904, $132,250,000, and no more, and that the average value of said capital stock during the said tax year was $124.6875 per share, thus showing that the value of its entire average amount of issued capital stock was $164,899,218.75, and no more.

3. That the total assets of the said petitioner wheresoever employed in and during the said tax year amounted to the sum of $390,314,019.79, and no more, of which assets amounting to the sum of $247,435,542.58, and no more, were employed within the State of New York, and of which total, assets amounting to the sum of $142,878,477.21 were continuously and at all times in and during the said tax year employed outside of and not within the
26 State of New York. That the average amount of its capital stock at par employed within this State was $83,838,521.93 of the average value of $104,536,157.03, and that, of the average amount of its entire capital stock, $48,411,478.07, of the average value of $60,363,061.72, was continuously and at all times in and during the said tax year employed outside of this State, and the tax lawfully computed and imposed in respect thereof was and would be the sum of $156,804.24, and no more.

4. That subsequent to the said 15th day of November, 1904, to wit: on or about December 23, 1904, the said Comptroller audited and stated the account of taxes to be paid by said company and sent to it notice thereof. That the said account so audited and stated was of and for a tax of $169,453.74, purporting to be a tax of one and one-half mills upon an appraised valuation of $112,969,158.04, the supposed basis thereof being that there was employed within this State in and during said tax year $267,396,331.66 of petitioner's said total assets, $90,601,831.01 of petitioner's said average capital stock at par, and $112,969,158.04 of average value of petitioner's said total capital stock..

5. That the said appraised valuation of $112,969,158.04, upon which the said tax was as aforesaid computed and imposed, included therein $8,433,001.01 of, as and being the appraised valuation of capital stock of the said company, no part of which was or consisted of such portion of the capital stock at par of the said company, as the amount of its capital employed within the State of New York in or during the year for which the said report was made, and for which the said tax was imposed, bears to the then entire capital of the said company; that the said tax so imposed upon the said $8,433,001.01

amounts to the sum of $12,649.50; that the said company
27 has insisted and now insists that the said tax of $12,649.50 upon the sum of $8,433,001.01, no part thereof being of or within such portion of its capital stock at par as the amount of its capital employed within this State bears to its entire capital, was erroneously and unlawfully assessed and imposed and payment thereof could not and cannot be lawfully demanded, and that the said $12,649.50 of the tax is wholly without authority of law.

6. That in truth and in fact only and no more than $83,838,521.93 of the capital stock of said company was the portion of its said entire capital stock at par which bore the same relation to the said entire capital stock as the amount of capital employed within the State of New York in or during the year for and on account of which said report was made and the said tax imposed, bore to the entire capital of said company; and that the balance of the entire amount of its capital stock, to wit, the amount of $48,411,478.07 thereof, bore the same relation to the amount of capital which was during the said year employed outside of the State of New York; by reason whereof the said company avers that the sum of $12,649.50, the purported tax of one and one-half mills upon $8,433,001.01 in excess of the $104,536,157.03, the value of the amount of $83,838,521.93, the par value of its capital stock employed within this State, is erroneously and unlawfully assessed and imposed, and that payment thereof should not have been demanded and could not and cannot be lawfully demanded, and is without foundation or authority of law.

7. That the State Comptroller, as and constituting the basis of the tax so as aforesaid by him computed, imposed and demanded, also and further added to the respective amounts in and by peti-
28 tioner's said report stated and set forth as the basis of, and for computation of the said tax for said tax year, for and in respect of the average value of petitioner's movable equipment shown by its said report to have been continuously and at all times during the said tax year used and employed outside of the State of New York, to wit, to the $247,435,542.58 total assets reported employed in this State, the further amount of $19,960,789.08; to the $104,536,157.03 average value of capital stock reported employed in this State, the further amount of $8,433,001.01; and as the additional tax in respect of and computed upon said amounts the sum of $12,649.50.

Concerning the said movable equipment the said report of petitioner to the State Comptroller sets forth that:

"Of the total capital of this company $19,960,789.08 in value of its equipment was employed outside of New York State. This amount is determined by taking such proportion of the value of passenger, mail and express cars, as the wheelage outside of the State bears to the wheelage both in and out of the State, and such proportion of the value of freight cars as the number of days cars were outside of the State bears to the total number of days (number of cars multiplied by 365 days) both in and out of the State."

The items composing the said amount and value of $19,960,789.08 are as follows:

Value of average number of this company's passenger, mail, express and freight cars used by it upon roads outside of N. Y. State.....	$3,513,619.12
Value of average number of this company's passenger, mail, express and freight cars used by other companies outside of N. Y. State.....	$16,447,169.96

29 That petitioner's said equipment, and the capital invested therein, as and when in manner aforesaid used and employed outside of this State, whether by this petitioner or by other persons or corporations, were so used and employed solely and exclusively under authority of and in the exercise of corporate franchises granted to corporations of its or their creation by the respective states and territories and foreign dominions within whose territorial jurisdiction the said use and employment were had and conducted and not in the use or exercise of any franchise granted by or taxable in the State of New York, and all in and about the rendering and performance of the common carrier service of the transportation of persons and commodities between points of shipment and points of destination, respectively, within individual states, territories and dominions other than the State of New York, and between points of shipment within the State of New York and points of destination in states and territories other than New York and in foreign dominions, and *vice versa,* and between points of shipment and points of destination and via routes altogether outside of the State of New York, and were thus used and employed in and about transportation local to individual states other than the State of New York and transportation constituting and pertaining to interstate commerce and foreign commerce all in such wise as did and does render it impossible for said petitioner to be informed or state the measure of such transportation employment constituting or pertaining to commerce local to any one or more individual states, or the measure thereof constituting or pertaining to interstate or foreign commerce, by means whereof to state or compute the amount of said assets or capital used or employed in either thereof, as distinguished or distinguishable from the other.

30 That taxation in and by the State of New York, for and upon and in respect of corporate creation, existence and capacity, for and during the designated term of corporate life, is by and under the law of the State of New York computed upon the basis of the amount of the authorized capital stock, and imposed, and paid, once for all, at the creation of the corporation, subject only to addition upon and in respect of subsequent increase of authorized capital stock.

That the tax here in question has relation to and is imposed in respect of the use and exercise of the corporate franchise granted by the State of New York, and, as such, is, at most, lawfully computable in respect of the use and exercise thereof within this State and upon the basis of the value of that portion of the amount of petitioner's issued capital stock which has been employed within this State during the respective tax year.

That if and in so far as the enactments under color of which this
x is imposed purport to authorize taxation for or upon or in respect
the aforesaid use or exercise of franchises foreign to the State of
ew York or computed upon the basis of capital thus in manner
oresaid used and employed within the territorial jurisdiction of other
ates, territories or foreign dominions in the use and exercise of and
nder the authority of franchises granted by them or by the United
tates to corporations created by them, respectively, the said enact-
ents are beyond the power and prerogative of the State of New
ork to prescribe and enforce and are violative of and contravene
he constitution, laws and treaties of the United States in that they
eprive petitioner of the equal protection of the laws; also, in that
they constitute the taking of property without due process
1 of law; also, in that they constitute a regulation of, interfer-
ence with and a burden upon interstate commerce and foreign
ommerce; also in that they impugn the dignity and sovereignty of
he United States and of sister states and of foreign dominions; also,
n that they impair the obligations of the contracts arising upon and
nhering in the grant to and acceptance by the corporations, the
essors and licensors of said petitioner, of the franchises by it as les-
ee and licensee, used and exercised in respective states, territories and
ominions other than and foreign to the State of New York; also,
n that they impair the obligations of the contracts of lease of
rackage right and license respectively, under and by virtue
f which petitioner uses and exercises in respective states and
erritories other than the State of New York and in foreign
ominions the franchises granted by them respectively to the
essors and licensors of said petitioner; also, in that they impair
he obligations of the contracts, express and implied, under which
etitioner is required to and does order, direct and permit or order,
irect or permit its movable equipment to pass to and remain in the
ustody and subject to the control of other corporations and be by
hem controlled and used in and about the transportation of persons
nd property upon their roads in other states and territories and
oreign dominions under authority of and in the use and exercise
f franchises granted by them respectively; also, in that the said
enactments and the judgments of the officers and tribunals in and
f the State of New York sustaining and administering them, in
nd by imposing and exacting payment to the State of New York
f a franchise tax computed upon the basis of the capital of said
petitioner employed within the territorial jurisdiction of
32 other respective States, in the use and exercise of franchises
granted by them, respectively, deny and refuse to give "to the
ublic acts" of said other respective States, by and under which the
aid franchises are granted and the use and exercise thereof author-
ized and regulated, the "full faith and credit" force and effect which
the said public acts are entitled to have and do have in the respective
States whose acts they are, by reason whereof the said petitioner
alleges that the said sum of $12,649.50, the purported tax of one and
one-half mills upon $8,433,001.01 in excess of $104,536,157.03, the
value of the amount of $83,838,521.93, the par value of its capital

stock employed within the State of New York is erroneously and unlawfully assessed and imposed, and that payment thereof should not have been demanded and could not and cannot be lawfully demanded and is wholly and altogether without foundation or authority of law.

Wherefore the said company makes this application and prays that the said account so audited and stated be revised and re-adjusted and that the said account be re-settled by striking therefrom or by crediting to the account of the said company the said sum of $12,649.50 and that the said company have such other or further relief as may be proper.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
By E. L. ROSSITER, *Treasurer.*

IRA A. PLACE,
Attorney for the Applicant, Grand Central Station, Borough of Manhattan, New York City, N. Y.

33 STATE OF NEW YORK, *County of New York, ss:*

Edward L. Rossiter, being duly sworn, says that he is an officer of the New York Central and Hudson River Railroad Company, the applicant above named, to wit, the treasurer thereof; that the foregoing application is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to these matters he believes it to be true.

E. L. ROSSITER.

Sworn to before me this 9th day of March, 1905.

ALBERT B. QUENCER,
Notary Public, New York County.

34 EXHIBIT THREE.

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

against

OTTO KELSEY, as Comptroller of the State of New York.

Whereas, the above named, The New York Central and Hudson River Railroad Company, heretofore, on or about the 9th day of March, 1905, applied to the Comptroller of the State of New York to revise and readjust the account theretofore audited and stated by the said Comptroller, imposing a tax upon the said The New York Central and Hudson River Railroad Company for the year ending October 31st, 1904, under Section 182 of the Tax Law, and to have

said account resettled by striking therefrom, or by crediting to the account of said railroad company the sum of twelve thousand six hundred forty-nine and 50/100 dollars ($12,649.50), and the said Comptroller having thereafter, a hearing having been had upon the said application, made his determination, allowing a credit
35 to the said company on the books of the department of the sum of five hundred seventy-one and 57/100 (-571.57) dollars; and

Whereas, the said The New York Central and Hudson River Railroad Company is dissatisfied and aggrieved by the said determination, and intends to review the said determination by writ of certiorari, and desires to file an undertaking with the said Comptroller as required by Section 197 of the Tax Law,

Now, therefore, the National Surety Company, a corporation duly authorized by the laws of the State of New York to execute surety bonds, having an office and principal place of business at No. 346 Broadway, Borough of Manhattan, City of New York, does hereby undertake that if the said writ of certiorari, which may be granted upon the application of the said The New York Central and Hudson River Railroad Company to review the said determination, be dismissed, or the determination of the Comptroller be confirmed, the said The New York Central and Hudson River Railroad Company will pay all costs and charges which may accrue against it in the prosecution of the said writ, including the cost of the appeals, not exceeding the sum of five hundred dollars ($500.00).

Dated New York, September 18th, 1905.

NATIONAL SURETY COMPANY,
By JOEL RATHBONE, *Res. Vice President.*

Attest: RICHARD J. MORIARTY,
[L. S.] *Res. Assist. Secretary.*

36 STATE OF NEW YORK, *County of New York, ss:*

On this 18th day of September, 1905, before me personally appeared Joel Rathbone, Res. Vice-President of the National Surety Company, with whom I am personally acquainted, who being by me duly sworn, said that he resides in the County of New York; that he is the Res. Vice-President of the National Surety Company, the corporation described in and which executed the within instrument; that he knows the corporate seal of said Company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the board of directors of said Company, and that he signed said instrument as Res. Vice-President of said Company by like authority; and that the liabilities of said Company do not exceed its assets, as ascertained in the manner provided in Section 3, Chapter 720 of New York Session Laws of 1893. And the said Joel Rathbone further said that he is acquainted with Richard J. Moriarty, and knows him to be the Res. Ass't Secretary of said Company; that the signature of the said Richard J. Moriarty subscribed to the said instrument is in the genuine handwriting of the said Richard J. Moriarty and was thereto subscribed by the like

order of the said board of directors and in the presence of him, the said Joel Rathbone, Res. Vice-President.

BELLE F. JAIS,
Notary Public for the County of N. Y.

Certificate filed in Kings, Westchester, Richmond and Queens Counties.

37 *Copy of By-Law.*

Be it remembered, that at a regular meeting of the Board of Directors of the National Surety Company, duly called and held on the 6th day of February, 1900, a quorum being present, the following by-law was adopted:

"ARTICLE XIII. SEC. 1.—*Signatures Required.* All bonds, recognizances, contracts of indemnity and other writings obligatory in the nature thereof, shall be signed by the President, the Vice-President, the Second Vice-President, a Resident Vice-President, or an attorney in fact, and, except when signed by an attorney in fact, shall have the seal of the Company affixed thereto, duly attested by the Secretary, an Assistant Secretary or a Resident Assistant Secretary. The Vice-President, Second Vice-President and Resident Vice-Presidents shall each have authority to sign such instruments whether the President be absent or incapacitated or not; and the Assistant Secretaries and Resident Assistant Secretaries shall each have authority to seal and attest such instruments, whether the Secretary be absent or incapacitated or not. All such instruments executed as herein provided shall be as binding upon the Company as if the same were signed by the President, duly sealed and attested by the Secretary."

STATE OF NEW YORK, *County of New York, ss:*

I, Richard J. Moriarty, Res. Ass't Secretary of the National Surety Company, have compared the foregoing copy of by-
38 law with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original by-law.

Given under my hand and seal of the Company this 18th day of September, 1905.

RICHARD J. MORIARTY,
[L. S.] *Res. Ass't Secretary.*

39 At a Special Term of the Supreme Court, held in and for the County of Albany, at the County Court House in the City of Albany, N. Y., on the 29th day of September, 1905.

Present: Hon. G. D. B. Hasbrouck, Justice.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

against

OTTO KELSEY, as Comptroller of the State of New York.

Order for Issuance of Writ of Certiorari.

Tax of 1904.

On reading and filing the petition verified and dated the 26th day of September, 1905, of The New York Central and Hudson River Railroad Company, and upon the undertaking heretofore filed by the said railroad company, pursuant to section 197 of the Tax Law, and upon the notice of this application duly served on the Comptroller of the State of New York, and after hearing Harris & Rudd, Esqrs., of counsel for the petitioner, and on motion of Ira A. Place, Esq., attorney for the petitioner, the Attorney General appearing and consenting to the making of the application at this time instead of on September 30th, 1905, it is

Ordered that a writ of certiorari do issue from and out of this Court pursuant to the prayer of the petitioner, directed to Otto Kelsey, as Comtroller of the State of New York, to review the decision and determination of the said Comptroller mentioned and described in the petition, and the question involving the merits therein mentioned, both upon the law and the facts, which writ shall be returnable within twenty days after service thereof upon the said Comptroller, at the office of the Clerk of Albany County.

Enter.

JOHN FRANEY, *Clerk.*

Supreme Court, Albany County.

Writ of Certiorari.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

against

OTTO KELSEY, as Comptroller of the State of New York.

Tax of 1904.

Whereas we have been informed by the verified petition of The New York Central and Hudson River Railroad Company, dated and verified the 26th day of September, 1905, that certain proceedings have been had before the Comptroller of the State of New York in a certain matter entitled "In the Matter of the Application of The New York Central and Hudson River Railroad Company for a revision and Readjustment of the account heretofore audited and

stated by the Comptroller of the State of New York for taxes under section 182 of the Tax Law, for the year ending October 31st, 1904," upon the application of the said Railroad Company to revise and readjust an account theretofore audited and stated by the said Comptroller of the State of New York for taxes to be paid by the said The New York Central and Hudson River Railroad Company under section 182 of the Tax Law, the petition upon which the said application was made being verified March 9, 1905, and a hearing upon such application having been had on the 6th day of June, 1905, and the said Comptroller having there-
42 after made his determination and sent written notice of his determination upon such application to the applicant, the petitioner herein, allowing in part and denying in part the application for revision or readjustment of the said account, and the said The New York Central and Hudson River Railroad Company having now made application to this Court for a writ of certiorari to review, in so far as the said application was denied and refused, the said decision and determination of the said Comptroller.

And we being willing for certain purposes to be certified of such proceedings, if any such were had, do hereby command and strictly enjoin Otto Kelsey, as Comptroller of the State of New York, that he certify and return all and singular the evidence before him on such application, and all the papers and proofs upon the original statement of such account and all proceedings thereon, and all his decisions and actions in the premises, with all the evidence, documents, reports, records and papers relating thereto in his possession or under his control, submitted to or considered by him, concerning the said account and the grounds of his refusal to revise and readjust the same, as prayed for in the petition, within twenty days after the service upon him of this writ, at the office of the Clerk of Albany County, under his proper hand, pursuant to the provisions of the Tax Law and the provisions of Title II. of Chapter 16 of the Code of Civil Procedure, so that our Supreme Court may further cause to be done thereon what of right and according to law ought to be done, and let the defendant have then and there this writ.

Witness the Hon. G. D. B. Hasbrouck, Justice of our Hon-
43 orable Court, at the Court House in the City of Albany, N. Y., this 29th day of September, 1905.

JOHN FRANEY, *Clerk.*

IRA A. PLACE,
Attorney for the Relator, Grand Central Station, Borough of Manhattan, New York City, N. Y.

The above writ is hereby allowed this 29th day of September, 1905.

G. D. B. HASBROUCK,
Justice Supreme Court.

44

Return.

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

against

OTTO KELSEY, as Comptroller of the State of New York.

1904.

Otto Kelsey, as Comptroller of the State of New York, the respondent herein, makes return to the writ of certiorari herein as follows:

I. He admits the truth of the allegations contained in paragraphs 2, 3, 5, 6 and 10 of the petition herein.

II. He admits that the petitioner is a domestic railroad corporation, organized and existing under the laws of the State of New York for steam surface railroad purposes and engaged in operating certain railroads, and was so engaged during the year ending October 31, 1904, as a carrier for hire transacting the business of transportation of persons and property; that the report of the petitioner referred to in paragraph 3 of said petition stated the amount of the authorized capital stock of the petitioner to be $150,000,000, and also stated that the amount issued, paid up and outstanding for the year ending October 31, 1904, was $132,250,000. That the dates of the payments of dividends and the rate thereof were as stated in paragraph 4 of said petition. That the said report stated that the entire amount of capital or assets of the petitioner was $390,314,019.79.

45

III.—He admits that the application for a resettlement and readjustment of the account for taxes, mentioned in paragraph 7 of said petition, was made and granted and the rehearing held, at which the petitioner appeared and submitted evidence. That thereupon the Comptroller determined the amount of taxes assessed against said petitioner to be $168,802.17.

IV. He denies the truth of the allegations of said petition, except as the same are expressly admitted herein.

V. He returns herewith the evidence and exhibits used in proceedings before him, except those, copies of which are attached to the petition herein.

VI. He further alleges that the tax mentioned in said petition was regularly, duly and legally imposed, settled and collected, pursuant to the provisions of the Tax Law of this State, and that the relator is not justly aggrieved thereby.

46

In witness whereof, the Comptroller has hereunto set his hand and seal this 20th day of October, 1905.

OTTO KELSEY, *Comptroller,*
By WILLIS E. MERRIM,
2nd Dep. Comptroller.

[L. S.]

(Endorsed.)

SIR: Take notice that the within is a copy of a return duly filed and entered in the office of the Clerk of Albany County, on the 20th day of October, 1905.

Yours, etc.,
JULIUS M. MAYER,
Attorney-General, Attorney for Resp'd't.

To Ira A. Place, Attorney for Relator.

47 State of New York, Comptroller's Office.

In the Matter of the Application of the NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY for a Revision and Readjustment of Taxes Assessed Under the Provisions of Chapter 908, Laws of 1896, and the Acts Amendatory Thereof for the Years 1902, 1903 and 1904.

Rehearing held at the office of the State Comptroller, June 6th, 1905, before Honorable Clark H. Timerman, Deputy State Comptroller.

Appearances.

J. H. Foulds, Jr., for the Company.
F. E. Williamson, for the Company.
Ira A. Place, represented by Thomas Emery, as counsel.

By COUNSEL: Now we have the three capital stock matters.

Mr. MERRILL: 1902, 1903 and 1904.

By COUNSEL: Yes, it will be a useless repetition to take the evidence separately for each, unless for reasons you desire to have it so.

Mr. MERRILL: Just make a statement of your contention, Mr. Emery.

48 By COUNSEL: Well, briefly, it is set out in our application, of course. Taking up the first, the year 1902.

Mr. MERRILL: What is this amount of $2,311,686.00, for instance, in this 1902 contention, what is that, on what ground do you claim that that should be excluded?

By COUNSEL: That is the capital stock of the M. D. T. Co.

Mr. MERRILL: Yes, that is the only new question you have involved here, that capital stock.

By COUNSEL: This is the situation, to state it as briefly as I can. In a previous year we had made the question whether we should be taxed on our holdings of Merchant's Despatch Transportation Company stock. We had been reporting it, including for taxation such percentage as we understood, such percentage of our holdings of that stock as constituted proportion of M. D. T. stock capital employed in this State. The Appellate Division, when the matter went there for review, held that we were liable to be taxed for all of it, and pending that judgment and before its review by the Court of Appeals one of our reports was made following judgment of the Appellate Division and including it all. Subsequently that was re-

versed and our contention sustained by Court of Appeals, but our Tax Department didn't understand that, and it resulted in the following year they included it all. On the other hand, this office supposed we hadn't included any of it. At any rate, that is the understanding I have of it, which I think Mr. Merrill will confirm, that we had included it all, and they thought we hadn't included any, so they added to it what they claim should be in. That
49 was one item, and that is the essential thing in which the figures are changed in the amended application from the original one, because in the meantime we learned where we were at, and that is we had made one mistake and the office here made another by reason of misapprehension of what we had done.

By Deputy Comptroller TIMERMAN:

Q. You wish to have this tried out along lines of Court of Appeals decision?

By COUNSEL: I do not think there is any question between us about that now. As I understand it it is simply to get proper figures before this department,

What I have said thus far would not give you complete idea of change of our application. The amended application changes further this feature. In the other cases we put in the evidence calculated to lay the foundation, as we thought, for a review by the United States Supreme Court, if desirable. Upon the hearing in the Court of Appeals our remittitur was made to show that the constitutional questions were raised, and in order to put beyond peradventure any question on that subject we amended this application conformable to the same applications made for other years, so as to set that question out clearly. The only things I think necessary for us to go into in this examination are the showing of the facts of what we undertake to show:

First, what the correct report would have been if we hadn't labored under this misapprehension that I speak of. By that disclose just what error there was in our report as made. Then show what the additions were that were made to that report in this department; that is, first, as I have said, the M. D. T. stock wh-ch we had
50 erroneously included entire, and the department supposed we hadn't included at all; and second, that outside claim. That is really our more important question in the case. That is to say, practically 60 per cent. of our rolling stock, that is in our freight cars and a considerable percentage of our passenger cars, but much smaller, are constantly in the service upon foreign lines and outside of the State. It is not any particular cars that are so used. They are changing every day and every hour of the day, so with something upwards of forty millions worth of rolling stock we have the use ourselves of practically two-fifths of it. That is to say, the other three-fifth-, substantially that, is on foreign roads, and in use by them, and largely in use that we cannot control, if we wanted to, because in the course of business cars are transferred from one company to another without consultation at all with the owning company. In addition to that the company operates what in general

terms is known as New York Central System. That includes the Boston and Albany, essentially in Massachusetts; the West Shore and Jersey Junction in New Jersey, and quite a number of roads in Pennsylvania. Our cars are used on all of these lines together. We contend then that instead of all of this entire rolling stock being regarded as assets employed in this State, and hence to be made the basis of computation of the amount of our capital stock employed in the State, that these portions, to wit, the portion which we
51 use on our operated lines in the New York Central System, but outside of New York State, should be deducted, and that the portion used upon foreign lines and outside of New York State should be deducted.

J. H. FOULDS, JR., being duly sworn, testified as follows:

By COUNSEL:

Q. Mr. Foulds, state where you reside, please?
A. Where I reside?
Q. Yes?
A. White Plains, New York.
Q. By whom and how are you employed?
A. By the New York Central, in the Auditor's office, assistant to Mr. Meeder, Chief Clerk.
Q. How long have you been engaged there in substantially the same line of service?
A. Since February, 1902.
Q. And what has been the fact in the meantime as to your making or assisting in the making of reports made by the company, or on its behalf, to the State Comptroller for taxation with reference to the capital stock of the company?
A. Well, they have been prepared largely by me personally or under my supervision.
Q. You gave attention to them for the purpose of knowing their accuracy, did you?
A. Yes, sir.
Q. And what is the fact as to whether you have, at my instance, prepared a statement with reference to that report, and the capital stock subject to taxation, a copy of which I now hand you?
A. I prepared this statement in response to your request.
Q. What have you to say as to figures set out in it under
52 the separate headings being or not being correct?
A. I believe them to be correct.
Q. The first item upon this paper, to which I have called your attention, Mr. Foulds, total assets, what does that mean?
A. That represents the total assets of the New York Central and Hudson River Railroad, as shown by the balance sheet.
Q. For that year?
A. Of October 31st, 1902.
Q. And the item, "average capital stock at par," what does that mean?
A. That represents the result obtained by taking the highest

amount of stock outstanding during the year and the lowest amount and averaging. The highest amount outstanding at par and the lowest amount outstanding during the year and averaging according to the number of months in which each was outstanding.

Q. And the item, "average cash value $200,156,525.69," what does that mean?

A. That is the average capital outstanding at par, multiplied by average price of stock during this year.

Q. And the row of figures across the page under the heading "Revised Statement," and with reference to their respective headings under which the figures appear, upon what are the computations based by which the results stated are shown?

A. Those figures under heading of "Revised Statement," those figures are obtained by taking our report figures and deducting from them the eighty-nine per cent. of M. D. T. stock, which we reported under a misapprehension in total.

Q. And so, then, the figures reading across the page under the words "as per report," they are the figures as the reports show?

A. Those are the figures as per report sent to the Comptroller.

Q. And upon the basis that you computed it then the revised statement amounted merely to the deduction of that eighty-

53 nine per cent. of M. D. T. stock from the amount in report?

A. Yes, sir.

Q. Now, in making these computations as shown under the heading "Revised Statement," you computed as not employed in the state the items in the two lines under the heading "Add Outside Equipment," did you?

A. Yes, sir.

Q. Now state, if you please, with reference to these items under the heading "Outside Equipment," first, is statement "4,780,862.98" under the heading "Assets Employed in New York State," that is, you mean employed in New York State as the basis of computation of the tax that this office imposed?

A. Yes, sir.

Q. And that $4,780,862.98 is made up how—what is it composed of?

A. It is composed of the value of the equipment arrived at on a basis of car mileage on New York Central system outside the State of New York.

Q. And the item under the same head; that is, under the same general heading but under the subheading "on foreign roads $11,865,528.08," what does that mean and how was it arrived at?

A. That amount is computed upon the basis of car mileage, as representing the use of New York Central cars on foreign lines outside the State of New York.

Q. And the item in the left-hand column, item last but one, $3,593,804.09, was the difference, was it, between the items of assets accounted for in the previous items and the total, which was apparently made the basis of taxation as imposed by this office, as you understand it?

Objected to by Mr. Merrill on the ground that it is a conclusion without any substantiation whatever.

By COUNSEL: I am simply asking him to explain what
54 that one item is making up that total.

By Deputy Comptroller TIMERMAN: I think there should be some proof on which apparent sum is obtained by which you claim we make this taxation.

Objection withdrawn.

A. It was.

By COUNSEL: I offer statement in evidence.

By Deputy Comptroller TIMERMAN: Do you offer this statement as proof of the facts contained therein?

By COUNSEL: I offer it with the witness's testimony as part of his testimony.

By Deputy Comptroller TIMERMAN: Merely as explaining his contention?

By COUNSEL: Yes.

By Deputy Comptroller TIMERMAN: And not as proof of the facts contained therein?

By COUNSEL: Except as his testimony as he had given.

By Deputy Comptroller TIMERMAN: That stands for itself.

By COUNSEL: I offer it as part of testimony of the witness.

By Deputy Comptroller TIMERMAN: If it is offered as proofs of facts contained therein, I do not think we can receive it.

By COUNSEL: Only in sense that his testimony is offered as proof.

By Deputy Comptroller TIMERMAN: That stands for itself; now you offer paper in addition to his testimony.

55 By COUNSEL: Not in addition to it; I offer it as part of his evidence.

By Deputy Comptroller TIMERMAN: For all purposes, without any limitations?

By COUNSEL: As part of his evidence.

By Deputy Comptroller TIMERMAN: Then I do not think I can receive it. I will receive it if it isn't offered as proof of facts, but merely as computation, showing position which you take in these matters.

By COUNSEL: I will proceed with some further questions.

Q. In course of its business, Mr. Foulds, does the company have reported to it the whereabouts and employment of its equipment from time to time?

A. I don't just understand the question.

Q. Question read by stenographer?

A. It does.

Q. And is memoranda preserved of such report?

A. Yes, sir.

Q. And in making up, or doing what you did with reference to making of the report of the company to this office for the purposes of taxation, did you have access to that data?

A. Not directly.

Q. Well, explain how it was, and from what source you got information?

A. We received the basis upon which the use of cars within and without the State is computed from the office of Superintendent of Freight Transportation, who has charge of such records.

Q. And from the reports which that office made to you, then, you made the computation?

A. Yes, sir.

Q. And what have you to say as to whether the sources of information from which and upon which you acted in the making up of the statement to which I have called your attention, were or
56 were not the same as those which you availed yourself of for purpose of making the report to this department?

A. I believe them to be the same.

Q. What was the total value of the company's equipment for the year 1902?

A. $46,619,097.89.

Q. How much of that was what is known as floating equipment?

A. $1,937,224.27.

Q. And that left as rolling equipment how much?

A. $44,681,873.62.

Q. And what do you say was the amount of this equipment used on foreign roads during that year?

A. The total amount?

Q. In use on foreign roads outside New York State?

A. $11,865,528.08.

Q. Then, how much of this equipment was used on foreign roads in New York State?

A. $1,409,970.40.

Mr. MERRILL:

Q. You mean other than New York Central system in New York State?

By COUNSEL:

Q. The meaning in the last question was roads foreign to New York Central system, but situate within the State of New York; is that the way you understood in answering it?

A. That is the way I understand the use of foreign roads.

Q. And that left, then, the total value of rolling equipment in use in New York Central system, how much?

A. $31,406,375.14.

Q. And of that amount which you have last named, how much was used on the New York Central system, but outside of New York State?

A. $4,780,862.98.

Q. What, then, was the amount of equipment in use in New York State on the New York Central system for that year?

A. $26,625,512.16.

Q. In the making of, or supervising the making of, reports
57 to this department for taxation for the year ending October 31st, 1902, then what items of assets and amounts of each of

this equipment did you count as constituting assets which should be considered in computing the amount of capital stock subject to taxation for that year?

A. The value of equipment in use in New York State on New York Central system, $26,625,512.16; on foreign roads, $1,409,970.40; floating equipment, $1,937,224.27.

Q. And that made the amount of these assets in the way of equipment to enter into basis of taxation, a total of what?

A. $29,972,706.83.

Q. In the business and operations of the New York Central and Hudson River Railroad Company, is there or is there not what is recognized as the New York Central System?

A. There is.

Q. And what does that include?

A. Includes the New York Central and Hudson River Railroad.

Q. In a general way?

A. And its leased and operated lines.

Q. That is, all lines operated directly by New York Central and Hudson River Railroad Company?

A. Yes, sir.

Q. And those lines are situated in what State?

A. New York, Massachusetts, Pennsylvania and New Jersey.

Q. What is the fact as to its operated roads outside of New York State as to whether they are all or approximately all operated under leases?

A. I believe they are all operated under lease.

Q. In some instances trackage rights where this company and another or other companies operate over the same rails?

A. In addition to leased lines we hold some trackage rights over other lines.

58 Q. What have you to say as to whether the memorandum here submitted to you sets forth correctly the leases under which this company operate the lines therein mentioned during the tax year in question, and as to the respective companies having been incorporated by those respective States as of the dates set forth?

A. To the best of my knowledge and belief the record is correct.

Q. And what is the fact as to these respective leases requiring the lessee company to pay all taxes upon the leased property as a part of its rental?

A. To the best of my knowledge and belief that is correct. Memorandum of lines operated by N. Y. C. as a part of its system in the states named:

Massachusetts:

Boston & Albany, incorporated January 10, 1871, by consolidation of numerous roads.

Leased November 15, 1899.

New Jersey:

West Shore Railroad, incorporated (reorganization) December 5, 1885.

Leased December 5, 1885.

Hoboken & Hudson River Turnpike Co. (Bull's Ferry to Hoboken), incorporated March 16, 1857; merged in New York and Bull's Ferry Railroad Company (Bull's Ferry to Jersey City), incorporated March 14, 1861; name changed to New York and Ft. Lee Railroad Company March 9, 1862.

Leased June 30, 1886.

Hoboken Land & Improvement Company (Weehawken southerly to other railroads), incorporated March 8, 1860.

Leased March 1, 1886.

59 New Jersey Junction Railroad Company (Township of Union to Jersey City), incorporated February 27, 1886.

Leased July 1, 1886.

New Jersey Shore Line Railroad Company (Township of Union, Hudson County, to Town of Harrington, Bergen County), incorporated March 2, 1886.

Stock owned by N. Y. C.

Pennsylvania:

Dunkirk, Allegheny Valley and Pittsburgh, incorporated (consolidation), December 31, 1872.

Leased January 3, 1873.

Jersey Shore, Pine Creek and Buffalo (Jersey Shore to Port Allegheny, McKean County), incorporated February 17, 1870; name changed to Pine Creek Railway Company February 13, 1884.

Leased May 1, 1899.

Beech Creek Extension Railroad Company, incorporated (consolidation) March 30, 1891.

Leased May 22, 1901.

Clearfield Southern Railroad Company, incorporated July 6, 1898; certificate amended October 26, 1903.

Leased October 1, 1903.

Syracuse, Geneva & Corning, incorporated (consolidation) November 2, 1885.

Leased May 1, 1899.

Curwensville & Bower, incorporated March 31, 1903.

Leased March 31, 1903.

Pittsburgh & Eastern, incorporated (consolidation) November 16, 1896.

Agreement for operation, December 27, 1899.

Leased February 24, 1904.

60 Corning, Cowanesque & Antrim, incorporated (consolidation) January 2, 1873; name changed to Fall Brook Railway Company July 1, 1892.

Leased May 1, 1899.

Beech Creek Railroad Company, incorporated June 30, 1886 (reorganization).

Leased October 1, 1890. Cambria County Railroad Company, incorporated August 31, 1896; consolidated with Beech Creek Railroad Company under name of Beech Creek Railroad Company, May 11th, 1898.

Statement headed "New York Central Capital Stock Tax 1902" marked "Exhibit A for identification."

By COUNSEL:

Q. Mr. Foulds, the statement marked "Exhibit A for identification," do you identify that as the one to which your attention was directed and concerning which you gave various respective answers in your previous testimony?

A. I do.

By COUNSEL: I now offer this statement in evidence as a part of the testimony of the witness.

Mr. MERRILL: I object to so much of it as is a conclusion.

Deputy Comptroller TIMERMAN: I think that part I will have to sustain.

Exception taken.

By Mr. MERRILL:

Q. Mr. Foulds, what balance sheet did you take this total statement of assets from?

A. Balance sheet of New York Central and Hudson River Railroad Company in the auditor's office.

61 Q. Does this statement of assets include the original cost of these assets?

A. I believe they do in all cases.

Q. Without deduction?

A. Without deduction.

Q. In arriving at the average amount of the capital stock issued and outstanding during the year ending October 31st, 1902, you did not take, as I understand you, the amount outstanding on November 1st, 1901, and then by determining the number of days that the several shares of stock issued in addition thereof were outstanding, obtained the average in that way?

A. Well, we obtained it by taking the number of months that a certain amount was outstanding and the number of months that another amount was outstanding, adding the two together and dividing it by twelve.

Q. Will the books of the company show the dates of issue of these several amounts of capital stock?

A. They will.

Mr. MERRILL: The Comptroller asks you to furnish a statement of the several dates when capital stock was issued, and the amounts issued on the several dates of the capital stock of the New York Central and Hudson River Railroad during the year ending October 31st, 1902.

Q. In the testimony which you have given in relation to equipment outside of the State of New York, do you know, or has there been any computation made which would show whether or not any of the equipment of the New York Central and Hudson River Railroad Company was used continuously and exclusively without the State of New York?

A. So far as I am aware there is not.

Q. None of it?

A. As far as I am aware there has been no such computation in connection with this report.

62 Q. Do you know whether there is any such equipment which is used continuously and exclusively without the State?

A. I do not.

Q. Do the figures which were furnished you show any such thing?

A. They do not.

Mr. MERRILL: The Comptroller will ask you to furnish a statement of all equipment of the New York Central and Hudson River Railroad Company used continuously and exclusively without the State of New York.

By COUNSEL: It is admitted that there is no substantial amount of the equipment of the New York Central and Hudson River Railroad Company that was used permanently, continuously or exclusively without the State during the entire tax year in question.

By Mr. MERRILL:

Q. In the computation which was made Mr. Foulds, based on mileage without and within the State that might be so made as to include a great many hundred miles of car mileage for one car and very little car mileage for another, might it not without regards of property value of the car itself?

A. I believe that it might.

Q. For instance, if a carload of goods of any description should be shipped in one car from New York to San Francisco, in such a determination as that the wheelage of that one car might be very large, larger than the wheelage of a half dozen or more cars employed constantly within the State of New York, might it not?

A. It might.

Q. What was the total value of the equipment of the New York Central and Hudson River Railroad Company during the year ending October 31st, 1902, on the average?

A. In round figures?

63 Q. You know, exactly, don't you?

A. $46,619,097.89.

Q. That was the cost of that equipment, was it?

A. That is the amount charged on the ledgers.

Q. As the cost?

A. As the cost of that equipment.

Q. Now, what was the amount of the stock of the Merchant's Despatch Transportation Company which you claim was employed in the State of New York, and the property of the New York Central and Hudson River Railroad Company?

A. Eleven per cent. That eleven per cent. means eleven per cent. of the amount owned by the New York Central.

Q. Mr. Foulds, you have testified that upon the figures supplied you by the Auditor's Department of the New York Central and Hudson River Railroad Company, the percentage of the stock of the Merchant's Despatch Transportation Company, owned by the New York Central and Hudson River Railroad Company and employed in New York State, was eleven per cent.?

A. Yes, sir.
Q. Have you any knowledge as to how that basis was arrived at?
A. I have not.

Mr. MERRILL: Well, the Comptroller desires to submit a copy of the determination made by this department with relation to the portion of capital stock of the Merchant's Despatch Transportation Company employed in conducting its business in this State, after a hearing held before Deputy Comptroller Timerman on May 4th, 1904, for the year ending October 31st, 1903, and the amount of capital stock outstanding for that year being the same as it was heretofore.

By COUNSEL: I object to it on the ground that it is immaterial and irrelevant.

64 Mr. MERRILL: It is material, because it shows more than three times the amount the New York Central claims was employed here.

Deputy Comptroller TIMERMAN: As I understand it, this inquiry here doesn't cover any period of any tax that was determined in this proceeding of May 4th.

Mr. MERRILL: No, but the same amount of capital stock was outstanding in the Merchant's Despatch Transportation Company in both years, so that the percentage employed here would be the same for both periods.

Objection sustained.

By Mr. MERRILL:

Q. Mr. Foulds, is there anything in the possession of the New York Central and Hudson River Railroad Company, either upon their books or otherwise, that would show conclusively the amount of the capital stock of the Merchant's Despatch Transportation Company used and employed in the State of New York during the year ending October 31st, 1902?
A. I don't believe there is.

Mr. MERRILL: The Comptroller asks that the New York Central and Hudson River Railroad Company produce at this office a witness or witnesses who are competent to testify as to the portion of the capital stock of the Merchant's Despatch Transportation Company employed in doing business in this State during the year ending October 31st, 1902. Will the company produce it?

By COUNSEL: I don't know; if we don't we cannot get the benefit of it.

65 By Mr. MERRILL:

Q. Have you any knowledge as to how this eleven per cent. basis was arrived at?
A. I have not.
Q. Mr. Foulds, is there any legal entity by the name of the New York Central System?
A. I do not think there is.
Q. Don't you know that there isn't?
A. Yes, sir.

Q. You simply use that term relatively to cover lines leased by the New York Central and Hudson River Railroad Company, over which it operates its cars?

A. Yes, sir.

Q. Over which it operates owned and leased lines?

A. Yes, sir.

Q. Is it or is it not a fact that the New York Central Company operates the cars of other companies over its own and leased lines?

Objected to by Mr. Emery, on the ground that it is irrelevant and immaterial. The tax here is on our capital; it is the employment of our capital in this State, and an unjust tax on our capital is not to be excused by showing that the law might make us liable for taxation on some other body's capital.

Deputy Comptroller TIMERMAN: While that might be true, Mr. Emery, I think I will receive the answer to this question, merely as part of the cross-examination.

Exception taken.

A. It does receive cars from other companies.

Q. Is that true with relation to their equipment, too?

Same objection, same ruling. Exception taken.

A. I believe not.

Q. Doesn't apply to locomotives and other equipment besides cars?

A. I should say not.

66 Q. When a car starts from the City of New York and travels westward over the lines of the New York Central Railroad Company and other railroad companies to California, and is then returned either empty or loaded with freight, does that car as property become the subject of taxation elsewhere than in the State of New York?

Objected to by Mr. Emery as incompetent, irrelevant and immaterial.

Mr. MERRILL: I show, Mr. Comptroller, that this property has its *situs* in the State of New York and nowhere else.

Objection overruled. Exception taken.

A. I do not know.

Q. Where does the ownership of the railroad of the New York Central and Hudson River Railroad Company end at its eastern (western) terminal?

A. City of Buffalo.

Q. Does the New York Central and Hudson River Railroad Company, as a railroad company, operate west of the City of Buffalo?

A. It does not—some little points beyond, between Black Rock, or something of that kind.

Q. None beyond the State of New York?

A. No, that is what I understood you to say.

Q. Then Mr. Foulds, when you have figured the car wheelage, mileage west of Buffalo, you have been figuring the business conducted by some other railroad company than the New York Central Railroad Company, have you not?

A. We have.

Q. What is the par value of the ownership of the New York Central and Hudson River Railroad Company in the stock of the Merchant's Despatch Transportation Company?

A. I couldn't say from memory—$2,597,400.00.

67 Q. Does that item of ownership, or a portion of it, appear in the $109,669,172.12 reported to the Comptroller as stocks of other companies outside the State of New York?

A. Does not.

Q. Where does it appear in this report?

A. Appears in the column headed "in the State of New York."

Q. The entire amount appears in there, does it?

A. It does.

Q. What is this "outside State of New York" amount made up of?

A. In the ownership of companies outside the State of New York.

Q. What companies?

A. Lake Shore and Michigan Southern, Michigan Central and other companies.

Q. Now, the cost of the road and equipment, excluding only that equipment which you claim was employed outside the State of New York was $174,618,395.45, was it not?

A. It was.

Q. In addition to that the company has claimed that this equipment, which it is admitted was practically none of it exclusively and continuously employed outside the State of New York, was $16,646,391.06, was it not?

A. It was.

Q. Now, under the head of "In State of New York" lessor companies, what does the term "lessor companies" mean?

A. It means money advanced or expended upon the roads of lessor companies of the New York Central, leased lines.

Q. And did the New York Central and Hudson River Railroad Company advance these moneys upon notes?

A. Not to my knowledge.

Q. How were they advanced generally?

A. Amounts spent upon the property by the New York Central.

Q. And had the New York Central no means of the re-

68 covery of the amount so expended?

A. Not in all cases.

Q. Well, how about a vast majority of the cases?

A. I should say to some extent they would have means.

Q. What did the New York Central and Hudson River Railroad Company have to show for such advances?

A. Nothing but the charge against the line, against the road.

Q. Charge against the road upon its books of account?

A. Yes.

Q. Well, then these two amounts, Mr. Foulds, $6,044,757.71 and $2,283,128.03 represent investments made upon leased line by the New York Central and Hudson River Railroad Company within and without the state respectively?

A. Yes, sir.

Q. And in the report rendered to Comptroller for the year ending October 31st, 1902, in the item of $16,499,270.65, stocks of other companies in the State of New York, you included the entire ownership of the New York Central and Hudson River Railroad Company in the stock of the Merchant's Despatch Transportation Company?

A. We did.

Q. In the statement of $109,669,172.12, stocks of other companies outside the State of New York, did you include in that the percentage of the stocks of those companies employed in doing business in the State of New York; for instance, as in the case of the Lake Shore and Michigan Southern Railway Company, did you include a portion of their capital stock in which you had an ownership as being employed in this state, or not?

A. We did not. The capital stock of the Lake Shore and Michigan Southern Railway owned by the New York Central was divided upon the basis of the amount of road mileage of the Lake
69 Shore in the State of New York compared with the total road mileage of the Lake Shore Railroad.

Q. Now, Mr. Foulds, the items of cash and cash assets, ownership in other lines, real estate, etc., fuel and supplies, bonds bought for account sinking fund and abolition of grade crossing *sus*pense account, all of them were correct as in the original return, were they not?

A. I believe they were, that is right.

F. E. WILLIAMSON, being duly sworn, testified as follows:

By COUNSEL: Where do you reside Mr. Williamson, and how and where are you employed?

A. I reside in New York City, and am employed as chief clerk to the Superintendent of Freight Transportation of the New York Central Railroad.

Q. How long have you been employed by the company and in what line of service?

A. I have been in the employ of the company about seven years, working in various capacities in the freight service in the Division Superintendent's office and later on in the office of the Superintendent of Freight Transportation.

Q. How long have you been in that office?

A. About a year and a half.

Q. Have your duties there made you familiar with the method of reporting the whereabouts of cars and the companies in whose service they are and change of hands from one company to another?

A. They have.

Q. And with the data that is received and kept by the company concerning those deliveries?

A. They have.

Q. Mr. Williamson, have you, at my request, prepared a record of some several car movements of cars off the lines, or to and
70 from and off of the lines of the company?

A. Yes, these were prepared under my direction.

Q. And prepared from the data that you speak of in the possession of the company?

A. Yes, from the original record.

Q. And what have you to say as to their being correctly transcribed from the record?

A. I believe them to be correct.

Q. For instance, car number 31,772, from Schenectady to Clearwater, South Carolina, that means, does it, that the car left the company's line at Schenectady on the 6th of March, 1902?

A. No, sir, the car was loaded at Schenectady for Clearwater, South Carolina, via Canandaigua—left our line at Canandaigua.

Q. On the 8th of March?

A. Yes, sir.

Q. And when did that car come back to the possession of the New York Central Company?

A. Was returned to us on July 2d of the same year.

Q. By what company?

A. By the Erie.

By COUNSEL: Without examining into detail each of these, I offer this in evidence.

Objected to by Mr. Merrill, for the reason that it does not show the fact that any of the equipment of the New York Central and Hudson River Railroad Company was continuously and exclusively employed during the year in question outside the State by any company, corporation or individual, nor does it show the fact that the New York Central and Hudson River Railroad Company did any business with such equipment outside the State of New York.

By COUNSEL: Of course, it is of no consequence whether we did business with it, or somebody else did business with it. We
71 offer it for the purpose of showing the general course of business by which our cars left our lines.

Objection overruled.

Received and marked "Exhibit B."

By COUNSEL: I desire also to offer in evidence the same record of car movements that were received in the other case.

Deputy Comptroller TIMERMAN: Is this offered for the purpose of proving that these cars were operated exclusively outside the State of New York, or that they were operated at all outside the State of New York by the New York Central Company?

By COUNSEL: No.

Deputy Comptroller TIMERMAN: Inasmuch as it isn't claimed that these exhibits will prove either of those facts, and as matter of fact it isn't claimed, I suppose that that really was the fact?

By COUNSEL: No, our cars are going to and from us and back and forth between other people daily and hourly.

By Deputy Comptroller TIMERMAN: Then it will be received. Marked "Exhibit B-1."

By COUNSEL: Now, I offer record of car movements as contained in papers on appeal from order, proceedings 1900, in case in the Court of Appeals, pages 53 to 59 inclusive.

Received subject to the same limitations.

Marked "Exhibit C."

Q. Calling your attention, Mr. Williamson, to the record of movements of car 41,278, as shown on page 53, of the Court of Appeals case, tax 1900, state, if you please, where that car was destined to when it left the company's line?

A. You ask me New York Central 41,278, where it was destined?

Q. Yes?

A. Detroit, Michigan.

72 Q. Car number 41,038, where was it destined to?

A. I have no destination on that.

Q. Car number 59,578?

A. Destined Chicago, Illinois.

Q. Car number 63,158?

A. Chicago, Illinois.

Q. Car number 18,236, where was it destined to?

A. Grand Rapids, Michigan.

Q. Car number 63,123?

A. Cleveland Transfer, Ohio.

Q. Car number 63,176?

A. Edison, Ohio.

Q. Car 64,431?

A. Chicago, Ill.

Q. Car number 61,831?

A. San Francisco, California.

Q. Car number 14,035?

A. Delivered Lake Shore, December 20th, 1901.

Q. Car number 27,941?

A. Joliet, Illinois.

Q. Now what do you say as to dates of year in which those cars left the company's possession?

A. All these movements were made in 1902, with the exception of car New York Central, 14,035, which was delivered to the L. S. & M. S. at East Buffalo, December 20th, 1901.

Q. What do you say, Mr. Williamson, as to whether the car movements as recorded in the records to which your attention has been called are or are not fairly illustrative of the general course of business in the handling of the company's freight cars?

A. The cases cited are fairly illustrative.

Q. State to the Comptroller what the general or uniform custom is, if there is such, with reference to general service freight cars, as to their return when they have reached the destination for which they left the possession of the owning company?

A. It is not the common practice to return cars empty—they are ordinarily used for loading either at the point at which made empty, or some adjacent point, and worked home in that way.

Q. And who determines about how these cars shall be used

73 when thus in the hands of a company other than the owner?

A. There are certain general rules for the handling of foreign equipment, but as it works out practically the control of the cars is entirely in the hands of the line upon which they are located.

Q. The company has for the time the possession of them?

A. Exactly.

Q. By what method is the owning company advised when its cars pass from the possession of one foreign company to another?

A. It is the practice of practically all of the railroads of the United States to report delivery of cars to owners; that is, when one road turns over a car to another they report to owner of that car the date of delivery and the line to which delivered.

Q. To illustrate, is this fairly illustrative of what you mean—if a car of the New York Central was in the possession of the Canadian Pacific and that company had lading for point on Oregon Short Line, and should load the car and transfer it to the Oregon Short Line Company in the ordinary course of business the Canadian Pacific would at once report that delivery to the New York Central?

A. They would.

Q. And in turn, as the Oregon Short Line would in the course of transportation, or otherwise, deliver that car to another company—for instance, the Union Pacific—the Oregon Short Line would report that delivery to the New York Central?

A. They would, provided it was a New York Central car.

Q. What are the customary methods, if there are such, that the owning company resorts to or avails itself of as a means of insuring delivery back to it of its cars in the hands of other companies; that is to say, is there a recognized time at which they have a right to
74 demand such return, and if so what is it and what are the methods of enforcing compliance with it?

A. As a general rule, the railroad companies rely upon the so-called per diem charge to effect return of their cars, or at least movement of them, this charge being twenty cents per car per day up to thirty days; but the owning line has a right to serve a penalty notice on any road which holds a car over twenty days, and if the car is not delivered off the line on which this penalty notice is served in the next ten days, the holding road then becomes responsible for a penalty rate on that car of one dollar per day.

Q. That is, eighty cents in addition to twenty?

A. In addition to twenty.

Q. And how is this notice given?

A. Given by the prescribed printed form under the rule of the American Railway Association.

Q. And how generally are these rules or customs that you have spoken of observed by the railroads of the country?

A. They are very generally observed.

Q. You have spoken of the charge per diem for cars held by companies other than the owning company,—how long has that been the method of charge for such cars?

A. Since July 1st, 1902.

Q. And prior to that time what was the basis of charge?

A. Prior to that time the basis of charge was mileage made at agreed rates.

Q. And what was the customary form of reporting that mileage made—was it in such form as to give specific numbers of cars, or merely a lump for mileage stated as the mileage made of cars of the owning company upon the reporting company's road for a given time?

A. It was the practice to report a lump sum representing the mileage of certain company's cars each month, but at the re-
75 quest of the owning companies in some cases the mileage of certain series of cars was given separately if it was so desired, but in a lump sum not individual car numbers.

Q. Where this report of the mileage of certain series of cars was made separately, as you have stated, what was the occasion for that?

A. It might be that a certain line of stock cars were under lease or some special arrangement in connection with a certain series of cars.

Q. By which do you mean it became necessary for the lessee company to know just what mileage those cars was to be reported to them?

A. Exactly.

Q. What is the usual custom with reference to coal cars, particularly with them in this respect, different from general service freight cars, as to their being returned empty?

A. Well, coal cars, of course, as a general proposition, are wanted at the mines for loading, so those cars are not used in the same general way that box cars are, but they are returned for loading either on the rails of ow-ing road, or some coal connection.

Q. In what State are the coal cars of the New York Central operated by it loaded?

A. Principally in Pennsylvania.

Q. What is the fact as to whether a considerable percentage of the cars of this company loaded upon or adjacent to its Pennsylvania lines pass at Newburry Junction from the lines of this company to other lines and thus on to their destination without going in the State of New York at all?

A. I cannot give a percentage figure, but certainly a very large number of cars are so handled.

Q. Carrying coal to tidewater via routes other than the Central Company's routes from Newburry Junction?

76 A. Or to points on southern lines other than tide.

Q. Are you able to state approximately the percentage of this company's cars, freight cars, which were used off of its lines during the tax year in question, ending October 31st, 1902?

A. My recollection is something over sixty per cent.

By Mr. MERRILL:

Q. Mr. Williamson, what do you mean when you say that sixty per cent. of freight cars of the New York Central and Hudson River Railroad Company are used outside the State of New York?

A. I mean that if at any time you were to make a count of the freight cars of the New York Central and dividing them, those in the State and those out, that out of every hundred cars you would find about sixty outside the State of New York; that condition would be generally true.

Q. That is, that during the year sixty per cent. of their equipment would be off outside the State all the time?

A. Yes, sir.

Q. Well, you don't mean to say that sixty per cent. of equipment of the New York Central and Hudson River Railroad Company is continuously and exclusively outside the State of New York?

A. I don't mean to say that any particular car is continuously and exclusively outside the State of New York, but I mean to say that on an average about sixty per cent. of total equipment is outside the State of New York.

Q. Relatively what part of equipment of people in connection with whom they do transportation business is in the State of New York, in hands of New York Central and Hudson River Railroad Company, to take place of this other equipment?

77 Objected to by counsel, on the grounds that it is incompetent, irrelevant and immaterial.

Objection overruled; exception taken.

A. Well, I can't say as to that.

Q. Well, is it not a fact that there is a great deal of such equipment here upon the lines of New York Central Railroad Company at all times?

Same objection; same ruling; exception.

A. It is a fact that we handle a considerable number of foreign cars at all times.

Deputy Comptroller TIMERMAN: I will ask to have you furnished a statement of the cars of outside railroads that are on this road, on the New York Central lines in place of this last answer, in which you state you couldn't definitely answer the question.

Counsel answers for the witness that the company will undertake to furnish such information, if practicable to obtain it, but objects to the subject matter called for by the question, objects to it being received in evidence on the ground that it is incompetent, irrelevant and immaterial to the questions here under consideration.

Objection overruled; exception.

Deputy Comptroller TIMERMAN: I would also like to ask for a copy of the rules you mention that govern this subject between railroads?

By COUNSEL: Yes, sir.

By COUNSEL: Now, I wish to offer in evidence the Constitution of Massachusetts, Part 2, Chap. 1, Sect. 1, Art. 4; also the statutes of Massachusetts, Chapter 13, entitled "The Taxation of Corporations" and the "Taxation of Corporate Franchises." That is

78 to say, on page 128, Public Statutes of Massachusetts, of 1882, page 128, is where this chapter begins and has this title. Now, on page 138, under the subject entitled "Taxation of Corporate Franchises" section 38, on page 139 of the same volume, section 39 and section 40 on page 140 of the same volume, section 42 on page 142 of the same volume, sections 53 and 54 on page 143, section 56 on page 144, sections 60, 61, 62; also acts and resolves passed by the general Court of Massachusetts in the year 1900 in volume entitled that, at page 464, Chapter 468, "An Act to authorize the lease of the

Boston and Albany Railroad to the New York Central and Hudson River Railroad Company, sections 1 and 11 of that act.

The above received and marked "Exhibit C-1 for identification."

By COUNSEL: I offer in evidence also the decision of the Supreme Judicial Court of Massachusetts, Attorney-General against Bay State Mining Company, 99 Mass. 148. I also offer in evidence the decision of the case, first, in the Circuit Court, I am not able to give volume of it now—that is, United States Circuit Court, and the review of that decision in the Supreme Court of the case of the Western Union Telegraph Company against Massachusetts, reported in 125 U. S. 530.

By Mr. MERRILL: I object to the admission of this as testimony on the ground that it is immaterial, irrelevant and incompetent, and has no bearing whatever upon the tax laws of the State of
79 New York, or the operation of such tax laws. That the laws of Masaschusetts or any other State cannot reach over into and operate under the laws of the State of New York, because such an operation would make their laws extra-territorial.

Deputy Comptroller TIMERMAN: These portions of the Constitution, also the statutes and the decisions, I presume, not having read them, refer to the taxation of franchises in the State of Massachusetts?

By COUNSEL: Yes; that is, they include that. The franchise is not taxed separately as it is here; it is included in the bulk valuation.

By Deputy Comptroller TIMERMAN: Now, do you expect to offer proof of paying franchise tax pursuant to those laws of Massachusetts?

By COUNSEL: It was conceded that our leases require us to pay a tax on leased property, and that includes franchise.

By Deputy Comptroller TIMERMAN: Of course, if you expect to prove payment of a tax, of course, with that agreement I might receive them, but if there is to be nothing offered here on that subject I do not see how the bare laws would be material.

By COUNSEL: I offer the laws themselves for the very purpose of showing what tax they provide for.

By Deputy Comptroller TIMERMAN: The mere provision for the tax I would be inclined to hold as immaterial, unless you agree to state that you expect to supplement it by proof of the actual
80 imposition of the franchise tax and the collection thereof.

By COUNSEL: I could do that, but haven't provided myself with it.

The last offer received and marked "Exhibit C-1, for identification."

By Deputy Comptroller TIMERMAN: The sections of the Constitution and the statutes, together with the decisions, are excluded for the time being. I reserve the right, however, to receive them if later in the testimony it appears that a tax was actually paid on the franchise of the New York Central and Hudson River Railroad Company, pursuant to these laws.

Exception taken to the exclusion.

By COUNSEL: I now offer the following laws of the State of New Jersey: General Public Laws of 1888, pages 269 to 287, being Chapter 208, entitled "An act to revise and amend 'An Act for the taxation of railroad and canal property,' approved April tenth, one thousand eight hundred and eighty-four." Also General Public Laws of 1888, pages 376, 377, being Chapter 259, entitled "An Act to amend an act entitled "An act to revise and amend 'An act for the (taxation) of railroad and canal property,' approved April tenth, one thousand eight hundred and eighty-four, which was approved March twenty-seventh, one thousand eight hundred and eighty-eight." Also General Public Laws of 1891, pages 165, 166, being Chapter 98, entitled "A Supplement to an act entitled "An act to revise and amend 'An act for the taxation of railroad and
81 canal property,' approved April tenth, one thousand eight hundred and eighty-four, approved March twenty-seventh, one thousand eight hundred and eighty-eight."

Same objection. Same ruling. Same exception.

Same received and marked "Exhibit D, for identification."

By COUNSEL: I now offer in evidence the Laws of the Commonwealth of Pennsylvania, Session of 1889, Number 332, page 420, entitled "A further supplement to an act entitled 'An act to provide revenue by taxation,' approved the seventh day of June Anno Domini one thousand eight hundred and seventy-nine," page 427, section 19. Also of the session of 1891, number 200, page 229, entitled "An act to provide, etc." At page 233, Section 4 and following, setting forth Section 20 of the act as amended. Also, the same State, session of 1893, number 288, page 353, the title of the act and section 1, setting forth section 21 of the former act as therein amended. Also, session of 1889, number 332, at page 431, section 23, same session laws, page 437, section 31.

Same ruling. Same objection. Exception.

Marked "Exhibit E, for identification."

By COUNSEL: Now, I offer in evidence the decisions of the Courts of Pennsylvania, as follows:

Commonwealth against Susquehanna & Schuylkill R. R. Co., 14 C. C., 440.

Pullman Palace Car Company against Commonwealth, 107 Pa. State, 156 and 141 U. S., 114.

82 Also Commonwealth against D., L. & W. R. R. Company, 145 Pa., 96.

Commonwealth against N. Y., P. & O. R. R. Co., 188 Pa., 169.

Same objection. Same ruling. Exception.

Marked "Exhibit F, for identification."

It is agreed that the evidence offered and the rulings with reference thereto in the proceeding regarding the tax for the year ending October 31st, 1902, shall be regarded and dealt with in the same manner with reference to the proceeding for the tax year ending October 31st, 1903, except so far as regards the evidence with reference to the particular amounts for that year, and except the evidence with regard to the M. D. T. stock, and that subject only to the exception noted in all respects, the same evidence may be regarded as

aving been offered and dealt with in this proceeding as it was in
roceeding for 1902.

It is further stipulated that the figures under the heading "Re-
apitulation of Distribution of Assets," October 31st, 1903, as shown
n the back of the original report herein, shall be accepted as cor-
ect, subject only to these exceptions, namely:

First, the figures under the heading "In New York State" as
'stocks of other companies," $16,552,269.97, should be reduced by
leducting therefrom 63.54 per cent. of $2,597,400.

Second, that of the item under "Outside New York" as "Cost of
road and equipment, $19,817,142.24," of this amount $414,540.86
represents an investment outside of New York State other
83 than equipment, the balance, to wit, $19,402,601.38, repre-
sents equipment, upon which the applicant claims exemption
from the basis of taxation upon the grounds set up by the testimony
in the 1902 proceeding, to wit, that $3,148,216.64 thereof represents
the average value of equipment employed by the railroad company
on its operated lines outside the State of New York, and the other
$16,254,384.74 represents the average value of its equipment used
on foreign roads outside the State of New York during the said tax
year, as testified to in the 1902 proceedings.

It is the same stipulation for 1904 as for 1903, except where you
come to accepting that under the head of "Recapitulation of Dis-
tribution of assets October 31st, 1904," the item "Cost of equipment
outside the State of New York, $19,960,789.08," consists exclu-
sively of equipment, and that the testimony with reference to the
same shall be to the effect that $3,513,619.12 was employed on roads
operated by the New York Central and Hudson River Railroad
Company outside of the State of New York, and $16,447,169.96
thereof was the average of its cars in the use of foreign corporations
outside of the State of New York during the said tax year, as indi-
cated in the testimony with relation to the same ground or matter
in the proceedings of 1902.

Papers showing car movements in the year ending October 31st,
1904, offered in evidence.

Received and marked "Exhibit G."

By Mr. MERRILL: Is it admitted by counsel for the com-
84 pany that the New York Central and Hudson River Railroad
Company is a railroad corporation, transportation company,
organized under the laws of the State of New York, and under the
laws of no other State?

By COUNSEL: My application says a railroad corporation, incor-
porated under the laws of no other State.

By Deputy Comptroller TIMERMAN:

Q. As a transportation corporation?

By COUNSEL: Surely.

85 EXHIBITS.

The following, signed by James H. Foulds, Jr., and Frederick Ely Williamson, was furnished in response to inquiry, to wit:

"The Comptroller asks you to furnish a statement of the several dates when the capital stock was issued, and the amounts issued on the several dates of the capital stock of the New York Central and Hudson River Railroad Company, during the year ending October 31st, 1902," and as and for his answer thereto says that the dates of issue of the increase of capital stock of said company during the year ended October 31, 1902, was as follows:

Date issued.	No. of shares.
April 21st	3,835
" 22d	3,981
" 23d	5,659
" 24th	4,798
" 25th	5,232
" 26th	3,799
" 28th	11,559
" 29th	7,267
" 30th	6,451
May 1st	7,926
" 2d	19,897
" 3d	1,230
" 5th	1,657
" 6th	2,170
" 7th	3,520
" 8th	2,896
" 9th	12,514
" 10th	7,585
" 12th	53,492
May 13th	1,130
86 " 14th	137
" 15th	125
May 16th	587
" 17th	38
" 19th	95
" 20th	348
" 21st	406
" 22d	34
" 23d	51
" 24th	18
" 26th	102
	168,539

Date issued.	No. of shares.
Brought forward	168,539
May 27th	24
" 28th	43
" 29th	18
" 31st	10
June 2d	40
" 3d	14
" 4th	61
" 5th	16
" 6th	12
" 7th	9
" 9th	13
" 10th	13
" 11th	9
" 12th	19
" 13th	36
" 14th	6
" 16th	15
" 17th	10
" 18th	23
May 19th	29
" 20th	11
" 21st	6
" 23d	5
" 24th	41
" 25th	5
" 26th	13
" 27th	20
" 30th	52
July 23d	34
Total	169,163

In response to the inquiry, to wit:

"I will ask to have you furnish a statement of the cars of outside railroads that are on this road, on the New York Central lines, in place of this last answer, in which you said you couldn't definitely answer the question," and as for his answer thereto says:

Our system of car records and accounts does not embrace accounts of foreign cars in the aggregate which may be employed upon our line. It consists of or includes individual car movements and car mileage in the aggregate. Computation of the estimated number of cars thus employed based on the mileage made on our line would indicate that while the number varies very much at different seasons of the year, the average number of foreign cars employed on the New York Central's operated lines within the State of New York during these respective tax years ending October 31st, 1902, 1903 and 1904, were approximately equivalent to the number of
87 this company's cars operated on foreign lines outside the State during each of such tax years.

And in response to the inquiry, to wit:

"I would also like to ask for a copy of the rules you mentioned that cover this subject between railroads, and for his answer thereto says: The paper hereto attached marked "Exhibit 1," is a correct and complete copy of the rules mentioned.

88

Exhibit 1.

The American Railway Association.

CODE OF

CAR SERVICE RULES

AND

CODE OF

PER DIEM RULES

GOVERNING SETTLEMENT FOR THE USE OF FREIGHT CARS.

CODE OF

CAR SERVICE RULES

Adopted October 24 1900;
With Amendments Agreed to April 24, 1901,
October 23, 1901, October 28, 1903,
and April 5, 1905.

7

RULES.

Foreign cars must be promptly returned to the home roads.*

2. Foreign cars may be properly used as follows:

(a) Loaded to points on or reached by using the home road.

---

*Note.—Whenever the words "home road" are used in these rules they refer to "The road which owns a car, or upon which the home of a private car is located."

(*b*) Loaded to intermediate points in the direction of the junctions at which they were received.

(*c*) If returned empty they should be moved over the routes by which they were received.

89 3. Foreign cars may be sent empty in the direction opposite to the junctions at which they were received, for loads to points on or reached by using the home roads, but not otherwise.

Foreign cars must not be sent empty to connecting roads without the permission of the owners, except for switching service. Loaded or empty cars received for switching service must be confined to switching limits, and returned to the home or the delivering road.

When empty foreign cars are delivered by one line to a connection for return loading via the road making the delivery, they must be so loaded and returned.

Rule 3. See page 12.

4. If loaded foreign cars on their return movements are re-consigned and such reconsignments would cause diversions of the cars, the lading must be transferred under the rules governing transfers at points of diversion, if this can be done without injury to

8 it, and the cars must be returned to the owners or to the roads from which they were received. In case the lading is of such a character that it cannot be transferred without injury the cars may be run through as re-consigned, but the facts of the case must be promptly reported to the owners of the cars.

5. Cars shall be considered as having been delivered to a connecting railroad when placed upon the track agreed upon and designated as the interchange track for such deliveries, accompanied or preceded by proper data for forwarding and accepted by the car inspector of the receiving road.

Unless otherwise arranged between the roads concerned, the receiving road shall be responsible for the cars, contents and Per Diem after receipt of the proper data for forwarding and until they

90 have been accepted by its inspector or returned to the delivering road.

6. The following rates per train mile, of actual distance for any trains using other lines in avoiding washouts or other obstructions, shall be in force unless otherwise arranged between the roads concerned:

Fifty cents per train mile for either a passenger or a freight train handled by its own engine and crew, together with the actual cost of pilotage, and with fuel and incidental supplies, at cost plus ten per cent., and water at fifty cents per tank; in case the engine and crew are furnished by the line whose track is used, the charge shall be one dollar per train mile, with no charge for fuel, water and engine supplies.

The road for which the train is detoured shall pay the regular Per Diem and mileage to the owners of the cars in the train, including the road owning the track, if any of its cars shall be in the detoured train. All mileage charges shall be at actual distance over the detoured route.

9 7. The following rates for the use of passenger equipment shall be in force unless otherwise arranged between the roads concerned.

(A) The rate for coaches, dining cars, chair cars, parlor cars, combined passenger cars and postal cars, shall be 3 cents per mile of actual distance; and for baggage, express, mail storage, combined baggage-express, combined baggage-mail, and combined baggage-mail-express cars, 1½ cents per mile of actual distance. These rates are to apply when the owners of the cars participate in the business and not when the cars are hired to other lines.

(B) The per diem rate for coaches, dining cars, chair cars, parlor cars, combined passenger cars and postal cars, hired at other than mileage rates, shall be five dollars per day, and for baggage, express, mail storage, combined baggage-express, combined baggage-mail, and combined baggage-mail-express cars, three dollars per day, subject, however, to agreement between the parties interested.

8. When a per diem rate is charged for the use of passenger equipment, as provided for in Rule 7, the total number of hours of all cars of the same class shall be calculated on a basis of twenty-four hours for each day and the charge made accordingly; any fraction of a day over the aggregate number of days of twenty-four hours each to be counted as one day; it being understood that the minimum charge shall be one day for each car.

When necessary to haul cars empty over the roads owning them, or intermediate roads for delivery to the borrowing roads, the tariff rate for such cars shall be charged the borrowing roads for hauling the cars from the points where they left service to the points of connection with the borrowing roads and return; the charge for the empty haul to be named to the borrowing roads at the time the agreement to loan cars is made.

Rule 8. See page 12.

9. The car service charge for delay in loading or unloading a freight car shall be one dollar a day after forty-eight hours from the time of delivery of the car for loading or unloading, not including Sundays or legal holidays, except where rates are fixed by Statute or local Car Service Associations.

Proper notice shall be provided in bills of lading, tariffs and expense bills, notifying shippers and consignees of the charge.

Charges for the delay of cars shall not be refunded except on the approval of the transportation officer designated by each road; at points where Car Service Association Rules are in force such additional regulations shall prevail as those rules may provide.

10. When any freight car is detained on a road by reason of a railroad error, the Car Service charges which may have accrued against shipper or consignee during the time such car is held awaiting proper data shall be cancelled; and the erring road shall pay to the road holding the car for the time the car is held until sufficient data is received to release it, the rate established by the Per Diem Rules for freight cars.

Where car service associations exist, the facts in the case shall be certified to the road upon which the Per Diem accrues by the manager of the Car Service Association, the claim against the erring road being made direct by the holding road.

11. New freight cars shall be stenciled when built with actual light weight, date of weighing and capacity. Steel cars shall be re-weighed and re-stenciled within the first year thereafter and wooden cars at the end of the first and second years.

All cars which have received general repairs shall be
11 weighed and stenciled, with the actual weight, immediately before being put back into service.

Any car without stenciling shall be immediately weighed and stenciled. New weights of foreign cars shall be reported to car owners.

12. The maximum excess allowed over the marked capacity of freight cars shall not exceed 10 per cent. of such marked capacity.

93 13. The placing of advertisements or placards of any kind by shippers upon freight cars is prohibited.

12

QUESTIONS

ON VARIOUS POINTS UNDER THE CAR SERVICE RULES AND DECISIONS OF THE COMMITTEE ON CAR SERVICE WHICH HAVE BEEN APPROVED BY THE ASSOCIATION.

RULE 3.

"Will you kindly advise me whether it is the intention to allow railroad companies to take switch cars and move them out on their lines for loading to owners? Rule 3 of the Code of Car Service Rules, adopted October 24th last, does not discriminate between switch cars and those received in through business."

In answer to this question the Committee's reply is "No."—*October* 23, 1901.

"Referring to the first paragraph of Rule 3 in the Code of Car Service Rules adopted by The American Railway Association October 24, 1900, which reads as follows:

"Foreign cars may be sent empty in the direction opposite to the junctions at which they were received for loads to points on or reached by using the home roads, but not otherwise."

"Will you kindly advise me your construction of this rule? Do the closing words 'but not otherwise' prevent the loading of a car in an opposite direction for the purpose of securing a load to points on or reached by using the home road, while permitting the cars to be sent empty for the same purpose?"

In reply to this question the answer of the Committee is that *it does.*—*October* 23, 1901.

RULE 8.

"In paying the per diem for cars under the provisions of Rule 8, is it the intention of the Committee that the aggregate number of hours of all cars hired to another line from time to time during a current month, or any other period for which bill is rendered, should be taken and divided by the aggregate number of hours by
94 twenty-four to find the number of days and fractions thereof for a basis of settlement; or is it the intention of the Com-

mittee to make charges and settlements on a basis of each individual car?"

Answer.—Rule 8 provides that, "the total number hours of all cars of the same class shall be calculated on a basis of twenty-four hours for each day and the charge made accordingly;" and it is, therefore, not the intention of the Committee to have charges and settlements made on a basis of each individual car.—*October* 23, 1901.

13

CODE OF

PER DIEM RULES

GOVERNING SETTLEMENT FOR THE USE OF FREIGHT CARS.

IN EFFECT JULY 1, 1905.

ADOPTED APRIL 24, 1902;
WITH AMENDMENTS AGREED TO OCTOBER 28, 1903,
APRIL 27, 1904, OCTOBER 26, 1904,
AND APRIL 5, 1905.

14

PER DIEM RULES AGREEMENT.

The subscribing railroad company promises and agrees with each railroad company severally which heretofore or hereafter may have subscribed and filed a like agreement with the Secretary of The American Railway Association, that the subscriber will abide by the rules governing settlement for the use of freight cars, as adopted by the Association and designated "Per Diem Rules" on the
95 minutes of its proceedings; this agreement to continue until withdrawn by three months' previous notice in writing to the Secretary of the Association.

15

DEFINITIONS

HOME CAR.—A car on the road to which it belongs.

FOREIGN CAR.—A car on a road to which it does not belong.

PRIVATE CAR.—A car having other than railroad ownership.

HOME.—A location where a Car is in the hands of its owner.

HOME ROAD.—The road which owns a car, or upon which the home of a private car is located.

HOME ROUTE.—The line of intermediate roads over which a foreign car was moved from home.

HOME JUNCTION.—A junction with the home road.

HOME ROUTE JUNCTION.—A junction on the home route.

SWITCHING SERVICE.—The movement of a car to be loaded or unloaded, or the movement of a car between railroads, at a charge for the service rendered within designated switching limits, the road performing the service not participating in the freight rate.

17

PER DIEM RULES

GOVERNING SETTLEMENT FOR THE USE OF FREIGHT CARS.

For Interpretations, see pages 22 to 25.
For Decisions, see pages 26 to 104.

1. The rate for the use of freight cars shall be 20 cents per car per day which shall be paid for every calendar day, and shall be known as the per diem rate.

RULE 1.—See Interpretation No. 25.

96 2. Days shall be reckoned by subtracting the date of receipt from the date of delivery. The day of receipt should be disregarded, and payment made for day of delivery.

A road receiving and delivering a car on the same date shall not pay the Per Diem for that day.

RULE 2.—See Interpretation No. 9.

3. A road shall have the right to demand the return of its car after it has been twenty days consecutively on any road. If the car is held by the road more than ten days after the date of such notice on the prescribed form (L), making thirty days in all, thereafter a penalty rate of 80 cents per day in addition to the per diem rate shall be paid by such road for the further use of that car.

RULE 3.—See Interpretations Nos. 10, 12, 13, 14, 15, 16, 20, 25 and 26, and Decisions Nos. 15 and 22.

4. All railroads, including ferry lines, shall be responsible to the car owner for amounts accruing for the use of a car at the established rates, whether such car is in road service or switching service, until the car has been delivered to the owner or to another road.

RULE 4.—See interpretations Nos. 5 and 25, and Decisions Nos. 1, 16 and 17.

5. An arbitrary amount for each car in switching service may be reclaimed by the switching line from the road for which the service was performed. This amount shall be based upon the aver-

18 age number of days actually required and determined by the roads directly interested for each local territory.

RULE 5. See Interpretations Nos. 7, 11, 18 and 19, and Decisions Nos. 6, 8, 9, 10, 12, 13, 14, 18, 19, 20, 21 and 23.

6. In case a road delivers an empty foreign car without the consent of the owner to a road which does not pay Per Diem; or if a road permits the loading or re-consigning of a foreign car without

97 the consent of the owner to such road it shall be responsible to the owner for the payment of an amount equal to the Per Diem accruing on the car while on such road.

In case the road so delivering or authorizing the delivery of a foreign car connects directly with the road which does not pay Per Diem, penalty shall accrue as if delivery had not been made.

RULE 6.—See Interpretation No. 6 and Decision No. 13.

7. When home route cards have been requested under the Master Car Builders' Rules, the Per Diem shall cease from the date of request to owner.

When a car has been destroyed and reported under the Master

Car Builders' Rules the Per Diem shall cease from the date of notice to owner.

RULE 7.—See Interpretations Nos. 4 and 8 and Decision No. 5.

8. When a car is detained awaiting the receipt of repair material from its owner, the Per Diem shall cease from the date the necessary material is ordered from the owner until the date when it is received by the road holding the car.

RULE 8.—See Interpretations Nos. 12, 13, 17 and 21.

9. The Interchange Reports shall close at midnight, and shall include all cars exchanged upon the date named unless otherwise noted thereon. The reports must be sent to the car record office on each day whether cars are exchanged or not.

In cases where there are different standards of time at junction points the time of the more easterly reckoning shall be used.

19 The Interchange Reports to the car record office from Junction points must be signed by the agents or other authorized representatives of both roads on the prescribed form, the receipt of cars delivered being thereby acknowledged. Car Service Rule

98 5 governs the delivery of cars.* The time of delivery of cars upon interchange tracks of connecting lines shall, *prima facie*, be the time given by the delivering roads.

RULE 9.—See decisions 2, 4 and 7.

10. The Junction Report for each day will be made to car owners on the prescribed form (D) as promptly as possible after the receipt of the Interchange Report for that day.

11. Within thirty days after the end of each calendar month, car owners shall be furnished with a Per Diem Report for that month, on the prescribed form, showing the number of days each car has been in service upon the road making the report.

Statements of corrections or omissions in Per Diem Reports must be presented within one year from the date when the Per Diem report to which they relate has been received. This will not prevent the continuance of any case after the period named, if it has been previously opened, even though the claim should eventually rest upon some road other than the one originally addressed.†

RULE 11. See Interpretations Nos. 1, 2, 3 and 9.

20 12. The settlement of amounts accruing for the use of cars and reclaims under Rule 5 shall be made monthly without regard to reclaims pending under Rules 13, 14 and 15.

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*Car Service Rule 5.

5. Cars shall be considered as having been delivered to a connecting railroad when placed upon the track agreed upon and designated as the interchange track for such deliveries, accompanied or preceded by proper data for forwarding and accepted by the car inspector of the receiving road.

Unless otherwise arranged between the roads concerned the receiving road shall be responsible for the cars, contents and Per Diem after receipt of the proper data for forwarding and until they have been accepted by its inspector or returned to the delivering road.

†This paragraph will not apply to statements bearing on amounts accruing prior to July 1, 1905.

12. The settlement of amounts accruing for the use of cars and reclaims under Rule 5 shall be made monthly without re-
99 *gard to reclaims pending under Rules 13, 14 and 15.*

13. When reclaims are made for allowances, under Rules 14 and 15, or on account of special conditions, they must be made by the designated transportation officer of the road which pays the Per Diem to the designated transportation officer of the road from which the allowance is reclaimed.

14. A road failing to receive promptly from a connection cars upon which it has laid no embargo shall be responsible to the connection for the Per Diem on cars held for delivery, including the home cars of such connection.

If such failure to receive shall continue for more than three days, the delinquent line shall thereafter in addition be responsible for the Per Diem on all cars wherever in transit which are thus held back for delivery.

It shall be the duty of a connection intending to reclaim such Per Diem allowance to notify the delinquent line daily of the total number of cars so held for it, and when required, to furnish the initials and numbers of the cars.

RULE 14.—See Interpretations Nos. 20, 23 and 24, and decisions Nos. 3, 11 and 26.

15. When a road gives notice to a connection that for any reason it cannot accept cars in any specified traffic, thereby instituting an embargo, it should receive cars already loaded with such traffic at the time such notice is issued. If it does not receive such cars the road holding them may reclaim Per Diem from the road placing the embargo for the number of days such cars are held not exceeding the duration of the embargo.

100 After the date of the notice a road must not load or reconsign cars in such traffic to the road issuing the notice.

All such notices must be given by telegraph, by the embargoing road, to its immediate connection and by it transmitted as
21 may be necessary.

RULE 15.—See Interpretations Nos. 20, 22 and 23.

16. These rules shall not apply to private cars.

17. To interpret these rules and to settle disputes arising under them an Arbitration Committee of five members shall be appointed by the Committee on Car Service. Three members of the Arbitration Committee shall be a quorum.

In case any question or dispute arises under these rules it may be submitted to the Arbitration Committee through the Secretary of the Association in abstract. The abstracts shall briefly set forth the points at issue and each party's interpretation of the rules upon which its claim is based. The Arbitration Committee shall base its decisions upon the rules and the abstracts submitted, and its decisions shall be final. Should one of the parties refuse to furnish the necessary information the Arbitration Committee shall use its judgment as to whether it can properly decide. All decisions shall be reported to the Association through the Committee on Car Service.

In case a question shall arise not covered by the rules the roads

disagreeing may, by mutual consent, submit such questions to the Arbitration Committee.

The Committee on Car Service may appoint a secretary for the Arbitration Committee, who shall be paid by the Association. The other expenses of the Arbitration Committee shall be divided equally between each of the parties to the dispute and the Association.

101 The minimum charge to each road shall be $10, payable in advance. The expenses shall be first paid by the Association and then billed to the parties concerned by the Treasurer of the Association.

22 *Interpretations of the Code of Per Diem Rules Rendered by Arbitration Committee.*

Question No. 1. A foreign car received and delivered the same day, should it appear on the Per Diem Report or not?

Answer. The car should be reported by car number as having earned no Per Diem.

Question No. 2. A foreign car received July 31st and delivered to a connection August 5th, should it appear on July Per Diem Report?

Answer. Car number need not appear on July report.

Question No. 3. A foreign car received July 26th and delivered to a connection August 5th, should it show five days in July account and five days in August account?

Answer. Yes.

Question No. 4. (*Note.*—Refers to rule in effect prior to January 1, 1904.)—If a road has a foreign car in a general worn-out condition, and under the Master Car Builders' Rules asks the car owner for proper cards to move the car home, are they responsible for the Per Diem during the time they are holding car for these cards, or would it be proper to construe Rule 7 as meaning that Per Diem will cease from the date that correspondence commences with the owner as to whether car will be repaired or returned to owner?

Answer. The words "When a car has been destroyed, or so damaged as to require an appraisement," in Rule 7 refer to cars

102 actually destroyed or condemned to be destroyed, and Per Diem should be paid on all other bad order cars.

Question No. 5. Should new cars en route from builder to owner, empty or loaded, be exempt from Per Diem?

Answer. Yes.

Question No. 6. Is a road responsible to the owner of a foreign car which they deliver to a road which does not pay Per Diem, while on that road, unless it receives from the owner of the car a

23 notice to the effect that their cars are not permitted to go on roads which do not pay Per Diem?

Answer. The road would be responsible for the Per Diem, and it is not necessary for the car owner to issue notice to that effect.

Question No. 7. Is a switching line entitled to reclaim the allowance on its own cars when tendered to it to be switched on account of another line?

Answer. A road cannot reclaim the allowance for the use of its own cars.

Question No. 8. Should Per Diem be allowed on freight cars in July that were totally destroyed in June but not reported to car owners until after July 1st?

Answer. Yes.

Question No. 9. Should Per Diem be paid on cars for July 1, 1902, that were on hand 12.01 A. M., July 1, 1902?

Answer. Yes.

Question No. 10. In case a car is received on the first day of the month, can penalty notice for return of car be dated on the 21st of that month, or must it be dated later?

Answer. Notice may be dated on the 21st.

Question No. 11. Does Rule 5 apply to cars that were in
103 switching service at 12.01 A. M., July 1, 1902?

Answer. Yes, unless otherwise specially agreed. The amount of reclaim is in the hands of the roads interested in each local territory.

Question No. 12. If a road receives a car on the first day of the month; damages it and orders material from owner on the 25th; material is received on the 20th of the following month; penalty notice is served by car owner on the thirtieth day after its receipt, or five days after material is ordered: When should road holding car commence paying the penalty rate?

Answer. Penalty notice takes effect in this case on receipt of material and penalty rate begins ten days thereafter.

Question No. 13. If a road receives a car on the first day
24 of the month; damages it and orders material from owner on the 11th; material is received on the 30th; on the twenty-fifth day after car is received penalty notice is served by car owner: Is this demand for penalty legal or are the rules for the collection of penalty suspended the same as they are for the Per Diem?

Answer. Demand for penalty is legal, but does not take effect in this case until ten days after material is received and penalty rate begins twenty days after material is received, as delay to car while awaiting material should not be computed.

Question No. 14. (*Note.*—Refers to rule in effect prior to January 1, 1905.)—If a road sends a penalty notice demanding a return of one of its cars, and before the ten days expire, the road having possession of the car delivers it to a road which does not pay Per
104 Diem, does this delivery release it from the penalty for which the notice has been given?

Answer. Yes.

Question No. 15. (*Note.*—Refers to rule in effect prior to January 1, 1905.)—In case a road has a foreign car for which it is liable for the $1.00 per day, would the delivery to a road which does not pay Per Diem stop the penalty of eighty cents a day?

Answer. Yes.

Question No. 16. Should the penalty rate accruing on a car on a road which does not pay Per Diem be paid by the road responsible for the Per Diem on that car?

Answer. Yes.

Question No. 17. Referring to Rule 8, should Per Diem be paid for date material is ordered, or for date on which material is received?

Answer. For date received.

Question No. 18. If a road handles a car between the junction of another road and a point on its line in a switching district under a special switching arrangement with the shipper or consignee; under such circumstances is the switching road entitled to a reclaim on the long haul road for the agreed allowance at that point?

Answer. No.

Question No. 19. Does Rule 5 apply when switching charge is assessed on a ton instead of a car basis?

Answer. Yes.

Question No. 20. Under Rules 14 and 15, is the railroad which fails to accept cars responsible for penalty rate as well as the Per Diem Rate?

Answer. Yes.

Question No. 21. Referring to Rule 8; when repair material is ordered, should the car numbers be sent to owner of the car if Per Diem is to be waived?

Answer. Yes.

Question No. 22. Under Rule 15 can a road reclaim Per Diem on its own cars?

Answer. Yes.

Question No. 23. In case a car held under Rules 14 or 15 for a certain road, is not delivered to that road, can reclaim be made against such road?

Answer. No.

Question No. 24. Under Rule 14, can the expression "and, when required, to furnish the initials and numbers of the cars," be interpreted to mean that a daily list shall be made which shall include initials and numbers of cars previously reported?

Answer. No.

Question No. 25. Under Rules 1, 3 and 4 must the Per Diem and penalty rate be paid by a road for the "use" of a car, when it is out of repair, unfit for service, or lying idle?

Answer. Yes.

Question No. 26. Under rule 3 and Interpretation No. 20 can penalty be collected by the owner road on its own cars when held for connecting line under Rule 14?

Answer. No.

106 Mr..... .....

.....R.....

....

Form No. (D)

North & South Railroad.

Junction Report of Cars Delivered to Our Connections.

On.....*190*...

(Printed Signature) .....

(Title of Officer) .....

(Address) .....

x Loaded. — Empty.

Car.		x —	Delivered to (Full Initials)
Full initials.	Number.		

☞ NOTE.—Standard size, 3¼ x 5½ inches, including margins.

07

Form No. (L).

NORTH & SOUTH RAILROAD.

Penalty Notice.

(Address and Date.)

..... 190 ...

Ir. .....

.....

.....

Cars of this Company as enumerated below have been on your line 20 consecutive days and you are hereby notified that unless same are disposed of within 10 days from this date, a penalty of 80 cents per car per day, in addition to the regular per diem rate, will be charged for these cars.

(Printed Signature.)

.....

(Title of Officer.)

.....

Retain original; return copy.

Check.	Car.			Delivered.		Reply.		
	Initials.	Kind.	Number.	By or at.	Date.	Location.	Disposition.	Date.
1								
2								
3								
4								
5								
6								
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☞ NOTE.—Standard sizes 8 x 10½ and 8 x 5¼ inches, including margins. Penalty notices should be printed in bright red ink on any color or quality of paper that each road may prefer.

For triplicate notices must be mailed in duplicate, the original to be retained by the receiving road; the copy to be returned as an acknowledgment, and bearing notations showing dispositions made of the cars which may have cleared the lines of the receiving road.

No other styles of penalty notices will be used, either of different sizes, different styles or by postal card

All Penalty notices should be mailed in an envelope bearing the full and complete address, (name, title road, town and state) of the officer to whom sent.

Preferably, Penalty notices should be sent by U. S. Mail only, although in the case of immediate and direct connections, they may be forwarded by Railway service.

EXHIBIT "A" FOR IDENTIFICATION.

New York Central Capital Stock Tax 1902.

Total Assets $359,316,025.89
Average Capital Stock at Par 123,458,150 00
Average Cash Value 200,156,525.69

Assets Employed.		Capital Stock at Par.		Capital Stock Cash Value.		Tax.
In N. Y. State.	Outside of N. Y. State.	In N. Y. State.	Outside of N. Y. State.	In N. Y. State.	Outside of N. Y. State.	
		Revised Statement.				
227,856,175.92	131,459,849.97	78,289,583.32	45,168,566.68	126,926,986.95	73,229,538.74	190,240.48
		Add 89 % of M D T Stock:				
2,311,686.60		794,227.06		1,287,721.68		1,931.58
		As per Report:				
230,167,861.92	129,148,163.97	79,083,860.38	44,374,289.62	128,214,708.63	71,941,817.06	192,322.06
		Add outside equipment:				
On System 4,780,862.98		1,642,666.78		2,663,173.52		3,994.76
On Foreign Rds. 11,865,528.08		4,076,901.79		6,609,677.01		9,914.52
		Report and Equipment:				
246,814,252.98	112,501,772.91	84,803,428.95	38,654,721.05	137,487,559.16	62,668,969.53	206,231.34
		Add unexplained addition:				
3,593,804.09		1,234,802.74		2,001,323.90		3,002.80
		Basis of Taxation:				
250,408,057.07	108,907,968.82	86,038,231.69	37,419,918.31	139,488,883.06	60,667,042.63	209,234.23

EXHIBIT "B."

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6/5, 1905.

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.....

EAR SIR: Below please find movements of N. Y. C. .....
number 90110, from Lockport to Oklahoma City.

C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON
d from					M		
n Lockport	9	30	'02		M		
L. C.	10	1	"		M		
. Belt	10	3	"		M		
. & Alton	10	5	"		M		
N. Ferry Co.	10	3	"		M		
Mo. Pac.	10	8	"		M		
A. T. & S. F.	10	10	"		M		
Frisco System	10	17	"		M		
Terminal R.R.	11	3	"		M		
So. Pac.	11	5	"		M		
Terminal R.R.	..	..	"		M		
Big Four	11	11	"		M		
L. S. & M. S.	11	13	"		M		
N. Y. C.	11	19	"		M		
d to					M		

EXHIBIT "B-1."

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6/5, 1905.

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.....

DEAR SIR: Below please find movements of N. Y. C. .....
r number 31772 from Schenectady to Clearwater, S. C.

C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
'd from					M		
m Schenectady	3	6	'02		M		
Canandaigua	3	8	"		M		
P. R.R.	3	8	"		M		
Wash. South	3	10	"		M		
R. F. & P.	3	11	"		M		
South. Ry.	3	11	"		M		
N. & W.	4	10	"		M		
P. & R.	4	13	"		M		
Erie	5	21	"		M		
N. Y. C	7	2	"		M		

Exhibit "B-1."

New York Central & Hudson River Railroad Co.

New York, 6/5, 1905.

.....

.....

Dear Sir: Below please find movements of N. Y. C. ..... Car number 56491, from Weehawken to Berlin, Ont.

C. H. Ewings, Car Acc't.

Movements.	Date. Month.	Day.	Year.	L. or E.	Time.	Train.	Con.
Rec'd from					M		
From W'k'n	3	17	'02		M		
To Susp. Bridge	3	20	"		M		
To G. T.	3	20	"		M		
To M. C.	4	3	"		M		
To L. S. & M. S.	4	6	"		M		
To N. Y. C.	4	16	"		M		

111

Exhibit "C."

Exhibit "4" and Exhibit "C" for Identification.

New York Central & Hudson River Railroad Co.

New York *Jan. 16th*, 1903.

Dear Sir: Below please find movements of N. Y. C. Car number 41278 from

C. H. Ewings, Car Acc't.

From	Train.	Date.	Time.	To	L. or E. Date.	Time.	Con.
N. Y. Central		4/19		Mich. Central		4/19	
Mich. Central		5/10		L. S. & M. S.		5/10	
L. S. & M. S.		6/6		Vandalia		6/6	
Vandalia		6/13		L. S. & M. S.		6/13	
L. S. & M. S.		6/24		Pere Marquette		6/24	
Pere Marquette		7/16		Mich. Central		7/16	
Mich. Central		7/18		Pere Marquette		7/18	
Pere Marquette		7/20		Mich. Central		7/20	
Mich. Central		9/21		Penn. Company		9/21	
Penn. Company		10/17		L. S. & M. S.		10/17	
L. S. & M. S.		10/31		Pitts. & Lake Erie.....		10/31	
P. & Lake Erie.....		12/8		Penn. R.R.		12/8	
Penn. R.R.		12/9		Penn. Company		12/9	
Penn. Company		12/12		Erie		12/12	
Erie		12/17		Clev., Cinn., Chic. & St. L.		12/17	

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *January 16th*, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 41038 from C. H. EWINGS, Car Acc't.

FROM	TRAIN.	DATE.	TIME.	TO	L. OR E. DATE.	TIME.	CON.
N. Y. Central		4/28		L. S. & M. S.	4/28		
L. S. & M. S.		5/8		Lake Erie & West	5/8		
L. E. & Western		5/20		L. S. & M. S.	5/20		
L. S. & M. S.		6/2		Grand Trunk	6/2		
Grand Trunk		6/19		Mich. Central	6/19		
Mich. Central		7/26		Chic., Milw. & St. P.	7/26		
Chic., Milw. & St. P.		7/29		Mich. Central	7/29		
Mich. Central		8/26		Chic. Junction	8/26		
Chic. Junction		8/31		Mich. Central	8/31		
Mich. Central		10/10		Chic., Rock I. & Pac.	10/10		
C., R. I. & Pac.		10/14		Missouri Pac.	10/14		
Mo. Pac.		10/20		C., R. I. & Pac.	10/20		
C. R. I. & Pac.		11/27		Chicago, Peoria & West.	11/27		
Chicago, Peoria & West.		11/29		Chic. R. I. & Pac.	11/29		
C. R. I. & Pac.		12/1		Ind. Ill. & Iowa	12/1		
I. I. & Iowa		12/2		N. Y. Chic. & St. L.	12/2		
N. Y. C. & St. L.		12/5		Lehigh Valley	12/5		
Cent. of N. J.		1/2		Penn. Railroad	1/2		
Lehigh Valley		12/7		Cent. of New Jersey	12/7		
Penn. R.R.		1/9		Washington South	1/9		

112 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *Jan. 16th*, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 33578 from C. H. EWINGS, Car Acc't.

FROM	TRAIN.	DATE.	TIME.	TO	L. OR E. DATE.	TIME.	CON.
N. Y. Central		4/2		L. S. & M. S.	4/2		
L. S. & M. S.		4/17		Lake Erie & West	4/17		
L. E. & Western		5/8		Cin. Ham. & Dayton	5/8		
Cin. Ham. & Dayton		5/20		L. S. & M. S.	5/20		
L. S. & M. S.		5/23		Mich. Central	5/23		
Mich. Central		6/4		Erie	6/4		
Erie		6/15		Mich. Central	6/15		
Mich. Central		8/20		Tor. Ham. & Buffalo	8/20		
Tor. Ham. & Buffalo		8/21		Mich. Central	8/21		
Mich. Central		9/15		Chic. & Alton	9/15		
Chic. & Alton		9/30		L. S. & M. S.	9/30		
L. S. & M. S.		10/12		Atch. Top. & S. Fe.	10/12		
Atch. Top. & S. Fe.		10/15		Ill. Northern	10/15		
Ill. Northern		10/19		Atch. Top. & S. Fe.	10/19		
Atch. Top. & S. Fe.		10/23		L. S. & M. S.	10/23		
L. S. & M. S.		10/31		Del. Lack. & Western	10/31		
Del. Lack. & Western		11/28		Mich. Central	11/28		
Mich. Central		12/26		L. S. & M. S.	12/26		
L. S. & M. S.		1/1		Penn. R.R.	1/1		

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *Jan. 16th*, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 63158 from C. H. EWINGS, Car Acc't.

FROM	TRAIN.	DATE.	TIME.	TO	L. OR E. DATE.	TIME.	CON.
N. Y. Central		6/12		L. S. & M. S.		6/12	
L. S. & M. S.		7/11		Ohio Cent. Lines		7/11	
Ohio Cent. Lines		7/18		L. S. & M. S.		7/18	
L. S. & M. S.		8/18		Pere Marquette		8/18	
Pere Marquette		9/8		L. S. & M. S.		9/8	
L. S. & M. S.		9/18		Wabash		9/18	
Wabash		9/28		L. S. & M. S.		9/28	
L. S. & M. S.		10/2		Chic. Mil. & St. P.		10/2	
Chic. Mil. & St. P.		10/5		Union Pacific		10/5	
Union Pacific		10/11		Southern Pacific		10/11	

113 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *Jan. 16th*, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 18236 from C. H. EWINGS, Car Acc't.

FROM	TRAIN.	DATE.	TIME.	TO	L. OR E. DATE.	TIME.	CON.
N. Y. Central		3/5		Mich. Central		3/5	
Mich. Central		3/6		Pere Marquette		3/6	
Pere Marquette		4/2		Mich. Central		4/2	
Mich. Central		4/10		Chic. Ind. & L'ville		4/10	
Chic. Ind. & Lou.		5/3		Elgin Jol. & Eastern		5/8	
Elgin, Jol. & Eastern		5/8		L. S. & M. S.		5/8	
L. S. & M. S.		5/13		Wheeling & L. Erie		5/13	
Wheeling & L. Erie		6/6		L. S. & M. S.		6/6	
L. S. & M. S.		6/9		Ill. Central		6/9	
Ill. Central		7/2		L. S. & M. S.		7/2	
L. S. & M. S.		8/21		Cin. Ham. & Dayton		8/21	
Cin. Ham. & Dayton		8/24		Louisvl. & N'shville		8/24	
Louisvl. & N'shville		9/24		Penn. Company		9/24	
Penn. Company		11/10		Lake Erie & Western		11/10	
Lake Erie & Western		11/25		Penn. Company		11/25	
Penn. Company		12/20		Clev. Cin. Chic. & St. L.		12/20	

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *Jan. 16th*, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 63123 from

C. H. EWINGS, Car Acc't.

FROM	TRAIN.	DATE.	TIME.	TO	L. OR E. DATE.	TIME.	CON.
N. Y. Central		6/15		L. S. & M. S.			6/15
L. S. & M. S.		6/18		Penn. Railroad			6/18
Penn. Railroad		6/22		L. S. & M. S.			6/22
L. S. & M. S.		6/25		Baltimore & Ohio			6/25
Baltimore & Ohio		7/17		L. S. & M. S.			7/17
L. S. & M. S.		8/1		Penn. Company			8/1
Penn. Company		8/6		L. S. & M. S.			8/6
L. S. & M. S.		8/14		Wheeling & L. E.			8/14
Wheeling & Lake E.		9/5		Mich. Central			9/5
Mich. Central		9/19		Wis. Central			9/19
Wis. Central		9/21		Mich. Central			9/21
Mich. Central		9/26		Chic. Ter. & Trans.			9/26
Chic. Ter. & Trans.		10/7		Chicago Belt			10/7
Chic. Belt		10/8		N. Y. Chic. & St. L.			10/8
N. Y. Chic. & St. L.		10/10		L. S. & M. S.			10/10
L. S. & M. S.		11/5		Chic. Bur. & Quin.			11/5
Chic. Bur. & Quin.		11/20		Chic. Belt			11/20
Chic. Belt		11/29		Mich. Central			11/29
Mich. Central		12/8		Detroit, Tol. & Mil.			12/8
Detroit, Tol. & Mil.		12/21		Penn. Company			12/21

114 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *Jan. 16th*, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 63176 from

C. H. EWINGS, Car Acc't.

FROM	TRAIN.	DATE.	TIME.	TO	L. OR E. DATE.	TIME.	CON.
N. Y. Central		2/11		L. S. & M. S.			2/11
L. S. & M. S.		2/14		C. C. C. & St. L.			2/14
C. C. C. & St. L.		2/17		Ohio Central Lines			2/17
Ohio Central Lines		2/22		Chesapeake & Ohio			2/22
Chesap. & Ohio		3/27		C. C. C. & St. L.			3/27
C. C. C. & St. L.		3/29		Ill. Central			3/29
Ill. Central		4/11		Chic. Ter. & Trans.			4/11
Chic. Ter. & Trans.		4/12		Chic. Belt			4/12
Chic. Belt		4/30		L. S. & M. S.			4/30
L. S. & M. S.		5/16		Chic. Junction			5/16
Chic. Junction		5/20		L. S. & M. S.			5/20
L. S. & M. S.		5/24		Lehigh Valley			5/24
Lehigh Valley		5/28		N. Y., N. H. & H.			5/28
N. Y., N. H. & H.		5/29		Boston & Maine			5/29
Boston & Maine		6/21		N. Y., N. H. & H.			6/21
N. Y., N. H. & H.		7/6		Lehigh Valley			7/6
Lehigh Valley		7/7		Ironton R.R.			7/7
Ironton R.R.		7/8		Lehigh Valley			7/8
Lehigh Valley		7/11		Mich. Central			7/11
Mich. Central		9/12		Lehigh Valley			9/12
Lehigh Valley		9/21		Norfolk & Western			9/21
Norfolk & Western		10/31		C. C. C. & St. L.			10/31
C. C. C. & St. L.		11/2		Grand Rap. & Ind.			11/2
Grand Rap. & Ind.		11/15		Dul. S. Shore & Atl.			11/15
Dul., S. Shore & Atl.		11/17		M. St. P. & S. Ste. M.			11/17
M. St. P. & S. Ste. M.		11/29		Dul. S. Shore & Atl.			11/29
Dul. S. Shore & Atl.		12/3		Grand Rap. & Ind.			12/3
Grand Rap. & Ind.		12/18		Penn. Company			12/18

115 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *Jan. 16th*, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 64431 from C. H. EWINGS, Car Acc't.

FROM	TRAIN.	DATE.	TIME.	TO	L. OR E. DATE.	TIME.	CON.
N. Y. Central		6/27		L. S. & M. S.			6/27
L. S. & M. S.		7/8		Chic. Ind. & St. L.			7/8
Chic. Ind. & St. L.		7/14		Mich. Central			7/14
Mich. Central		7/30		Det. Tol. & Mil.			7/30
Det. Tol. & Mil.		8/5		L. S. & M. S.			8/5
L. S. & M. S.		8/18		Penn. R.R.			8/18
Penn. R.R.		9/7		N. Y., N. H. & H.			9/7
N. Y., N. H. & H.		9/9		Boston & Maine			9/9
Bost. & Maine		9/17		N. Y., N. H. & H.			9/17
N. Y., N. H. & H.		9/19		Bost. & Maine			9/19
Bost. & Maine		9/24		N. Y., N. H. & H.			9/24
N. Y., N. H. & H.		10/4		Penn. R.R.			10/4
Penn. R.R.		10/22		Penn. Co.			10/22

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *February* 9, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 61834 from C. H. EWINGS, Car Acc't.

MOVEMENTS.	MONTH.	DATE. DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from							
From N. Y. C.							
To L. S. & M. S.	July	2	1902		M		
From L. S. & M. S.							
To Elgin, Joliet & Eastern	"	6	"		M		
From Elgin, Joliet & Eastern							
To Chicago & No. Western	"	8	"		M		
From Chicago & No. Western							
To Union Pacific	"	10	"		M		
From Union Pacific							
To Southern Pacific	"	14	"		M		
From Southern Pacific							
To Union Pacific	Aug.	8	"		M		
From Union Pacific							
To Southern Pacific	"	11	"		M		
Delivered to Southern Pacific							
Rec'd from Southern Pacific							
From Southern Pacific							
To Atch., Topeka & Santa Fe Coast Line	Dec.	17	"		M		
From Atch., Topeka & Santa Fe Coast Line							
To Southern Pacific	"	18	"		M		

116 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *February* 9, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 14035 from

C. H. EWINGS, Car Acc't.

MOVEMENTS.	MONTH.	DATE. DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from					M		
N. Y. C.					M		
To L. S. & M. S.	Dec.	20	1901		M		
From L. S. — M. S.					M		
To Cleve., Cin., Chic. & St. L.	"	23	"		M		
From Cleve., Cin., Chic. & St. L.					M		
To Norfolk & Western	"	28	"		M		
From Norfolk & Western					M		
To Cleve., Cin., Chic. & St. L.	Jan.	8	1902		M		
From Cleve., Cin., Chic. & St. L.					M		
To Norfolk & Western	"	12	"		M		
From Norfolk & Western					M		
To Chesapeake & Ohio	"	14	"		M		
From Chesapeake & Ohio					M		
To Southern	"	20	"		M		
Del'd to					M		
Rec'd from					M		
From Southern					M		
To Washington Southern	Feb.	20	"		M		
From Washington Southern					M		
To Southern	Mar.	15	"		M		
From Southern					M		
To Baltimore & Ohio	"	24	"		M		
From Baltimore & Ohio					M		
To Southern	Apr.	21	"		M		
From Southern					M		
To Baltimore & Ohio	July	9	"		M		
From Baltimore & Ohio					M		
To Southern	"	11	"		M		
From Southern					M		
To Washington Southern	Sept.	3	"		M		
Del'd to							
Rec'd from					M		
From Wash. Southern					M		
To Southern	Oct.	26	"		M		
From Southern					M		
To Chesapeake & Ohio	Nov.	7	"		M		
From Chesapeake & Ohio					M		
To Penn. R.R.	Dec.	3	"		M		
From Penn. R.R.					M		
To Chesapeake & Ohio	Jan.	4	1903		M		
From Chesapeake & Ohio					M		
To					M		
From					M		
To					M		
From					M		
To					M		
Del'd to					M		

117 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, *February* 9, 1903.

DEAR SIR: Below please find movements of N. Y. C. Car number 27941 from C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from					M		
N. Y. C.					M		
To Mich. Central.....	June	12	1902		M		
From Mich. Central.....					M		
To Chic., R. I. & Pac.....	"	14	"		M		
From Chic., R. I. & Pac.....					M		
To Colo. Midland	"	18	"		M		
From Colo. Midland					M		
To Rio Grande Western.....	"	20	"		M		
From Rio Grande Western....					M		
To Southern Pacific.....	"	21	"		M		
From Southern Pacific.....					M		
To Union Pacific.....	Aug.	8	"		M		
From Union Pacific.....					M		
To Southern Pacific.....	Sept.	16	"		M		
Del'd to							
Rec'd from					M		
From Southern Pacific.....					M		
To Union Pacific.....	"	22	"		M		
From Union Pacific.....					M		
To Rio Grande Western.....	"	23	"		M		
From Rio Grande Western....					M		
To Colo. Midland.....	Oct.	7	"		M		
From Colo. Midland.....					M		
To Denver & Rio Grande.....	"	31	"		M		
From Denver & Rio Grande...					M		
To Colo. Midland.....	Nov.	5			M		
From Colo. Midland.....					M		
To Chic., R. I. & Pac.....	"	25	"		M		
From Chic., R. I. & Pac.....					M		
To					M		
Del'd to							

118 EXHIBIT "C" FOR IDENTIFICATION.

PUBLIC STATUTES OF MASSACHUSETTS, 1882.

(p. 23.) See note, 125 U. S., 531.

EXTRACT FROM THE CONSTITUTION OF MASSACHUSETTS.

Part 2, Chap. 1, Sect. 1, Art. 4, of the Constitution gives the Legislature power "to impose and levy proportional and reasonable assessments, rates and taxes upon all the inhabitants of, and persons resident, and estates lying within the said Commonwealth," and also "to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise and commodities whatsoever, brought into, produced, manufactured, or being within the same."

(p. 128.) CHAPTER 18.

OF THE TAXATION OF CORPORATIONS.

* * * * * * *

(p. 138.) TAXATION OF CORPORATE FRANCHISES.

SECT. 38. Every corporation chartered by the commonwealth, or organized under the general laws for purposes of business or profit, having a capital stock divided into shares, excepting banks whose shares are otherwise taxable under this chapter, and except those specified in sections forty-three and forty-six, shall annually, between the first and the tenth days of May, return to the tax commissioner, under the oath of its treasurer, a complete list of its shareholders, with their places of residence, the number of shares belonging to each on the first day of May, the amount of the capital stock of the corporation, its place of business, the par value and market value of the shares on the said first day of May. Such return shall, in the case of stock held as collateral security, state not only the
119 name of the person holding the same, but also the name of the pledger and his residence. The returns shall also contain a statement in detail of the works, structures, real estate and machinery owned by said corporation and subject to local taxation within the commonwealth, and of the location and value thereof. Railroad and telegraph companies shall return the whole length of their lines, and the length of so much of their lines as is without the commonwealth; other corporations required to make a return under this section shall also return the amount, value and location of all works, structures, real estate and machinery owned by them and subject to local taxation without the commonwealth; *provided*, that nothing herein contained shall exempt any corporation from making all returns required by its charter.

(p. 139.) SEC. 39. The tax commissioner shall ascertain, from the returns or otherwise, the true market value of the shares of each corporation included in the provisions of the preceding section, and shall estimate therefrom the fair cash valuation of all of said shares constituting its capital stock on the first day of May next preceding, which shall be taken as the true value of its corporate franchise for the purposes of this chapter. He shall also ascertain and determine the value and amount of all real estate and machinery owned by each corporation, and subject to local taxation, and of the deductions provided in the following section; and for this purpose he may take the amount or value at which such real estate and machinery are assessed at the place where the same are located as the true amount or value; but such local assessment shall not be conclusive of the true amount or value thereof.

120 (p. 139.) SECT. 40. Every corporation embraced in the provisions of section thirty-eight shall annually pay a

tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock, as determined in the preceding section, after making the deductions provided for in this section, at a rate determined by an apportionment of the whole amount of money to be raised by taxation upon property in the commonwealth during the same current year, as returned by the assessors of the several cities and towns under section eighty-six of chapter eleven, upon the aggregate valuation of all the cities and towns for the preceding year, as returned under sections fifty-four and fifty-five of said chapter; *provided*, that in case the return from any city or town is not received prior to the twentieth day of August, the amount raised by taxation in said city or town the preceding year, as certified to the secretary of the commonwealth, may be adopted for the purpose of this determination; and *provided, further*, that the amount of tax assessed upon polls the preceding year, as certified to the secretary, may be taken as the amount of poll tax to be deducted from the whole amount to be raised by taxation, for the purpose of ascertaining the amount to be raised by taxation upon property. From the valuation, ascertained and determined as aforesaid, there shall be deducted—*First*, in case of railroad and telegraph companies, whose lines extend beyond the limits of the commonwealth, such portion of the whole valuation of their capital stock, ascertained as aforesaid, as is proportional to the length of that part of their line lying without the commonwealth; and also an amount equal to the value, as determined by the tax commissioner, of their real
121 estate and machinery located and subject to local taxation within the commonwealth; *Second*, in case of other corporations, included in section thirty-eight of this chapter an amount equal to the value, as determined by the tax commissioner, of their real estate and machinery, subject to local taxation, wherever situated: *provided*, that, whenever the charter of a corporation provides a different method of ascertaining the valuation of its corporate franchise for the purposes of this chapter, the same shall be ascertained in the method provided in such charter.

* * * * * * *

(p. 140.) SECT. 42. Every corporation or association chartered or organized elsewhere, which owns, or controls and uses, under lease or otherwise, a line of telegraph within this commonwealth, shall make all the returns prescribed in section thirty-eight to be made by telegraph companies within the commonwealth, excepting the list of its shareholders; and shall annually pay a tax at the same rate, and to be ascertained and determined in the same manner as is provided in section forty; and all telegraph lines within the commonwealth controlled and used by such corporation or association, shall, for the purposes of this chapter, be taken and considered as part of its own lines.

* * * * * * *

(p. 142.) SECT. 53. The tax commissioner shall, as soon as may be after the first Monday in August, in each year, notify the treasurer of each corporation, company, copartnership, or association

liable thereto, of the amount of its tax under sections twenty-five, forty, forty-two, forty-five, forty-seven, fifty, and fifty-two, to become due and payable to the treasurer of the commonwealth within thirty days from the date of such notice: *provided*, that it shall not
122 be due and payable earlier than the first day of November. Such notice shall also state that within ten days after the date thereof the said corporation, company, copartnership, or association may apply for a correction of said tax, and be heard thereon before the board of appeal hereinafter established.

(p. 142.) SECT. 54. Any corporation, company, copartnership, or association taxable under the provisions of sections forty, forty-two, forty-three, forty-five, forty-seven, fifty, and fifty-two, neglecting to make the returns required by this chapter, or refusing or neglecting, when required thereto, to submit to the examinations provided for therein, shall forfeit two per cent upon the par value of its capital stock, all which penalties may be recovered by an action of tort, brought in the name of the commonwealth, either in the County of Suffolk or in the county where the corporation is located. If any corporation, company, copartnership, or association fails to pay the taxes required to be paid to the treasurer of the commonwealth under the provisions of said sections forty, forty-two, forty-three, forty-five, forty-seven, fifty, fifty-one, and fifty-two, he may forthwith commence an action of contract in his own name, as treasurer, for the recovery of the same, with interest at the rate of twelve per cent. per annum until the same are paid. All penalties under this section, and under sections seven, forty-seven, fifty, and fifty-two, may also be enforced, and all taxes under said sections forty, forty-two, forty-three, forty-five, forty-seven, fifty, fifty-one, and fifty-two, may also be collected by information brought in the Supreme Judicial Court at the relation of the treasurer of the commonwealth, and upon such information the Court may issue
123 an injunction restraining the further prosecution of the business of the corporation, company, copartnership, or association, until all such taxes due or penalties incurred shall be paid, with interest at the rate aforesaid, and costs. In any proceeding under this section the certificate of the tax commissioner or his deputy shall be competent evidence of all determinations made and notices given by him, and of all values, amounts, and other facts required to be fixed or ascertained by him under this chapter.

* * * * * * *

(p. 143.) SECT. 56. The lessee of the works, structures, real estate, or machinery of any corporation, company, copartnership, or association taxed under sections forty, forty-two, forty-three, forty-five, forty-seven, fifty, fifty-one, and fifty-two, shall be liable as well as the lessor to pay the amount of said tax, and upon such payment may, in the absence of any agreement to the contrary, retain the same out of the rent of the property, or recover the same in an action against the lessor.

* * * * * * *

(p. 144.) SECT. 60. The tax on corporate franchises herein im-

posed upon any corporation shall not affect nor prevent the imposition and collection of any other tax now authorized, or that may hereafter be authorized, upon any especial privilege, franchise or business enjoyed or exercised by such corporation.

SECT. 61. Any party aggrieved by the decision of the tax commissioner arising under the provisions of sections twenty-five to fifty-eight inclusive, excepting corporations named in section
124 forty-six, may apply to the board of appeal constituted under the provisions of the following section for a correction of the same.

SECT. 62. The treasurer and the auditor of the commonwealth, together with one member of the council to be named by the governor, shall constitute a board of appeal, to which board any party aggrieved by a decision of the tax commissioner upon any matter arising under this chapter, from his decision upon which an appeal is given, may apply within ten days after notice of such decision for a correction of the same. Upon such appeal said board shall, as soon as may be, give a hearing to such party, and shall thereupon decide the matter in question, and notify the tax commissioner and the party appealing; and such decision shall be final and conclusive as to the rights of the parties affected, although payments may have been made as required by the decision of the tax commissioner appealed from. Any over-payment of tax, determined by the decision of said board of appeal, shall be reimbursed from the treasury of the commonwealth."

ACTS AND RESOLVES PASSED BY THE GENERAL COURT OF MASSACHUSETTS IN THE YEAR 1900.

(p. 464.) CHAPTER 468.

"An Act to Authorize the Lease of the Boston and Albany Railroad to The New York Central and Hudson River Railroad Company.

SECTION 1. Subject to the conditions hereinafter mentioned the consent of the Commonwealth is hereby given to the contract and lease of the railroad, franchises and property of the Boston and Albany Railroad Company, and to a supplemental contract in connection therewith for the sale of certain of its assets, which contracts
125 were made and entered into between the directors of the Boston and Albany Railroad Company and the directors of the New York Central and Hudson River Railroad Company on the 15th day of November in the year eighteen hundred and ninety-nine, and which were severally approved and adopted by the votes of the stockholders owning more than two-thirds of the stock of each of said corporations which was represented and voted upon in person or by proxy at special meetings called separately for that purpose.

* * * * * * *

(p. 466.) SECTION 5. The lessee, so long as it has possession of the said railroad under said lease, shall, so far as the operation of said railroad is concerned, be subject to the provisions of all laws now in force or which hereafter may be enacted concerning railroad corporations incorporated within this Commonwealth.

* * * * * * *

(p. 467.) SECTION 11. Upon any failure to comply with and observe the final decrees and mandates of the supreme judicial court of this Commonwealth, provided for in the foregoing sections of this act, or of any federal court of competent jurisdiction, the consent and authority herein given may be revoked and annulled at any time by the general court, notwithstanding any prior failure to observe and comply with any decree or mandate aforesaid. The remedies provided in this and the preceding sections shall be in addition to and shall not repeal any remedies already existing.

SECTION 12. This act shall take effect upon its passage."

Approved July 17, 1900.

126 "EXHIBIT C–1 FOR IDENTIFICATION."

99 MASSACHUSETTS REPORTS, PAGES 148–154.

THE ATTORNEY GENERAL

vs.

BAY STATE MINING COMPANY.

The tax of a certain percentage of the par of its capital stock, imposed by the St. of 1865, c. 283, Sec. 8, on every company or association "having an office or place of business within this Commonwealth for the direction of its affairs or transfer of shares," and "incorporated elsewhere" "for the purpose of engaging without the limits of the Commonwealth in the business of coal mining or other mining, quarrying, or extracting carbonaceous oils from the earth, or for the purpose of purchasing, selling or holding mines or lands without the Commonwealth," is warranted by the Constitution of the Commonwealth, and is not in conflict with the Constitution of the United States; nor was said sec. 8 in any respect repealed or annulled by the St. of 1866, c. 291.

Information filed December 13, 1867, on the St. of 1865, c. 283, sec. 14, at the relation of the treasurer and receiver-general of the Commonwealth, seeking a decree for payment by the defendants, a corporation organized under the law of Michigan for the purpose of engaging in the business of mining copper in that State, of taxes in 1866 and 1867, under the St. of 1865, c. 283, sec. 8, the material part of which is printed in the margin;* and for an injunc-

*"Every corporation chartered by this Commonwealth, or organized under the general laws, for the purpose of engaging, without the limits of the Commonwealth, in the business of coal mining or other mining, quarrying or extracting carbonaceous oils from the earth, or for the purpose of purchasing, selling or holding mines or lands without the Commonwealth, and every such company or association, incorporated elsewhere, and having an office or place of business within the Commonwealth for the direction of its affairs or transfers of shares, shall, semi-annually, between the first and the tenth day of June and December, make a return, under the oath of its treasurer, or president, to the tax commissioner, of the whole amount of its capital stock, as fixed by the corporation, on the first day respectively of May and November next preceding, and pay to the treasurer of the Commonwealth a tax of one twentieth of one per cent. upon said capital stock at the par thereof."

127 tion against further prosecution of business in the Commonwealth by the defendants, until the same should be paid with interest.

The information alleged the maintenance by the defendant corporation of an office or place of business, namely, the office of its treasurer, in Boston, for the direction of its affairs and transfer of shares; and the making of returns by its treasurer to the tax commissioner in June and December, 1866, and June, 1867, in conformity with the statute; that in truth and fact the par value of its capital stock as fixed on May 1 and November 1, 1866, and May 1, 1867, was as thus returned; and that "by reason thereof said corporation became liable and was bound to pay to the treasurer of the Commonwealth" the taxes alleged being one-twentieth of such par value at the three dates last named.

The answer substantially admitted the facts alleged in the information; but denied "that said corporation owes the taxes mentioned in said information to said Commonwealth and interest thereon, or any part of said taxes and interest, or is or was liable and bound to pay to the treasurer of said Commonwealth said taxes," alleged that the defendant corporation "is a foreign corporation owning real estate in the state of Michigan, and employing its capital stock in the working of a mine in said state, that said capital stock is owned in part by citizens of states other than the
128 state of Massachusetts, that nearly all the contracts for labor at said company's mine and for materials purchased for use at said mine are entered into in Michigan, and drafts for the payment of the same, drawn by the agent of the company at the mine on the treasurer of the company, residing in Boston, are delivered to and received by the laborers, and parties furnishing materials, as payment;" further denied "that said Commonwealth has the right or power, under the Constitution of the United States, or under the Constitution of the said Commonwealth, to tax said corporation, said corporation being a foreign corporation and receiving all its corporate powers and privileges from the state of Michigan," and finally alleged "that the provisions of said St. of 1865, c. 283, so far as it is pretended that the same are applicable to said defendants in requiring the payment of a tax to the treasurer of said Commonwealth are repealed by the provisions of the St. of 1866, c. 291.

The case was reserved by Foster, J., on the information and answer for determination by the full court.

C. Allen, Attorney General, and J. C. Davis, for the Commonwealth, besides cases cited for the defendants and in the opinion, cited Tremont Bank *v.* Boston, 1 Cush. 145, Angell & Ames on Corporations, sec. 486a; DeGroot *v.* Van Duzer, 20 Wend. 390; Bank of Augusta *v.* Earle, 13 Pet. 589; Corfield *v.* Coryell, 4 Wash. C. C. 380; Blackstone Manufacturing Co. *v.* Blackstone, 13 Gray, 488; McCulloch *v.* Maryland, 4 Wheat. 429, Providence Bank *v.* Billings, 4 Pet. 564; Nathan *v.* Louisiana, 8 How. 82; Biddle *v.* Commonwealth, 13 S. & R. 409; Commonwealth *v.* Milton, 12 B. Monr. 212; Fire Department *v.* Noble, 3 E. D. Smith, 440;
129 Fire Department *v.* Wright, *Ib.* 453; State *v.* Delaware, Lackawanna & Western Railroad Co., 1 Vroom, 473.

J. G. Jackson, for the defendants. 1. The Commonwealth has no authority to tax the capital stock of a foreign corporation. The legislature has power to impose "proportional and reasonable assessments, rates and taxes, upon all the inhabitants of, and persons resident and estates lying within the Commonwealth;" and also to impose "reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities whatsoever, brought into, produced, manufactured or being within the same." Const. of Mass., part 2, c. 1, sec. 1, art. 4. But this gives no authority to impose taxes on property or persons not subject to their jurisdiction. The capital stock, as such, of the defendant corporation, is beyond its jurisdiction.

In Portland Bank *v.* Apthorp, 12 Mass. 252, and Commonwealth *v.* Hamilton Manufacturing Co., 12 Allen, 298, the defendants being domestic corporations, it was held that under the term "commodity" their charters were included, and that the legislature, which created and sold these commodities, might, as the price of the commodity, in the one case levy an excise or duty each year on the franchise of the bank, measured by the capital stock which it permitted the bank to hold, and in the other case measure the value of the commodity sold by the market value of the shares. But in the case at bar, though the legislature may compel the defendant corporation to pay a license for maintaining an office for the transaction of part of its business in Massachusetts, yet, having no control over the charter, it cannot levy a tax on the capital stock, all of which
130 is employed in another state. Massachusetts does not grant the defendant's franchise; and so cannot tax it. The principle that a state, in order to tax a corporation on its franchise, must have granted the charter, or have the corporate property within its limits, seems to be expressly recognized by the St. of 1864, c. 208, secs. 6, 9, and by the very St. of 1865, c. 283, secs. 5, 7, relating to railroad and telegraph companies extending beyond the limits of Massachusetts or incorporated by other states. See also Eastern Bridge *v.* The County, 9 Barr, 415.

The real and personal estate of the corporation may be taxed to the corporation by any power within whose jurisdiction it may be found; and the interest of the shareholders is personal to them, and may be taxed to them in their places of domicil, whether the shares so held by them are shares of foreign or domestic corporations, and notwithstanding, in the case of foreign corporations, that such corporations have paid taxes on their franchises and corporate property to the power which created them. Gordon *v.* Appeal Tax Court, 3 How. 133; Angell & Ames on Corporations, sec. 458; Dwight *v.* Mayor & Aldermen of Boston, 12 Allen 316; Commonwealth *v.* Berkshire Insurance Co. 98 Mass. 25. But if Massachusetts has jurisdiction for taxation over such of the shares of this Michigan corporation as are held by citizens of Massachusetts, it does not follow that it has therefore such jurisdiction over all the shares of the capital stock of the corporation, part of which are owned by citizens of other states, and that it may so tax property in other states belonging to citizens of other states.

2. The St. of 1865, c. 283, on which this information is based, so far as applicable to the taxation of the capital stock of foreign mining corporations to such corporations, and not to the individ-
131 ual holders of shares in such stock, is repealed by the statute of 1866, c. 291, sec. 2, and the power to tax the shares in such corporations remitted to the towns and cities where the stockholders reside.

3. By the answer it appears that nearly all the contracts for labor at the mine in Michigan, and for materials purchased, are entered into in Michigan, and drafts for payments in fulfillment of these contracts are drawn on the treasurer of the company. The information asks the court to enforce the statute by enjoining the treasurer from paying these drafts; which would be in contravention of the Const. of the U. S., art. 1, sec. 10, forbidding any state from passing any law impairing the obligation of contracts.

WELLS, *J:*

The defence in this suit seems to rest upon the supposition that the existence and organization of the corporation, the functions and capacities with which it is endowed by the law creating it, are alone what constitute the franchise or "commodity," which is the subject of the tax or excise imposed by the St. of 1865, c. 283. If it were so, there would be much force in the argument that, when these are derived exclusively from the authority of another state, they are not proper subjects of state taxation here.

But we think this is a too limited view of the matter. It is not merely the creation of corporate functions and privileges, or the conferring of rights and franchises by the legislature, which entitles the state to tax the possessor of such privileges and rights. The exercise of powers or privileges, and even of occupations without especial powers or privileges, may be equally subjected to such taxation, under the constitutional authority to "impose and levy reasonable duties and excises." It was so considered in the case of
132 Portland Bank *v.* Apthorp, 12 Mass. 252; and the tax of one per cent. laid upon the capital stock of the bank, was justified upon principles equally applicable to individuals transacting similar business, and to brokers, factors, auctioneers, &c. The tax was not sustained on the ground that the corporation derived its existence from the state which imposed the tax; on the contrary, one principal question in that case was, whether, by the charter, the state had not conferred upon the bank the privilege of doing the business for which it was created, without restriction, so as to exempt the corporation from the requisition of any tax or duty afterwards levied upon the exercise of that privilege.

That decision is sufficient for the present case. The tax is, indeed, in form, levied upon the capital stock of the corporation. But it is not merely the franchise of incorporation that is the basis of the tax, nor is it the capital, regarded merely as property. In case of domestic corporations, it is based upon a valuation which involves an estimate of all the advantages, present and prospective, which the stock is supposed to derive from the combination of capital and the

exercise of all the rights and privileges enjoyed by the corporation in the conduct of its business. Commonwealth *v.* Hamilton Manufacturing Co. 12 Allen, 298.

When the exercise of corporate functions, authorized by the state, is extended beyond the limits of the state, as in railroads and telegraph lines, the tax is apportioned accordingly. In the case of mining companies whose mines are without the state, the tax is limited by the "par" of the stock, and the tax upon foreign companies is founded upon the express consideration of "having an office or place of business within the Commonwealth for the direction of its affairs or transfer of shares." A mining corporation
133 which comes within the terms of this provision has its domicil of business within the Commonwealth, as completely as one that is organized under our General Statutes for the prosecution of a like enterprise. A corporation which seeks, by its agents, to establish a domicil of business in a state other than that of its creation, must take that domicil, as individuals are always understood to do, subject to the responsibilities and burdens imposed by the laws which it finds in force there. The state may deny to foreign corporations the right to transact their business, hold property, or exercise any corporate function whatever within its limits. Or it may permit them to exercise such privileges upon terms prescribed by law, as has long been done in relation to insurance companies. Erie Railway Co. *v.* New Jersey, 2 Vroom 531. The provisions of the statute in question are founded upon this right of exclusion or of conditional admission. Exclusion is the remedy provided to enforce compliance. The very defence to the suit implies the enjoyment of valuable rights and privileges within the Commonwealth, which a foreign corporation can only exercise by comity and the permission of the state.

The court are all of opinion that the tax upon the defendant corporation is legal; that it is warranted by the Constitution of the Commonwealth, and is not in conflict with any provision of the Constitution of the United States, and that sec. 8 of the St. of 1865, c. 283, is in no respect repealed or annulled by the St. of 1866, c. 291.

The Commonwealth is therefore entitled to an injunction restraining the further prosecution of the business of the defendant corporation within the Commonwealth, excepting the payment of debts already contracted, until all taxes due under said act shall be paid with interest and costs.

134 "EXHIBIT C–1 FOR IDENTIFICATION" (Con't).

33 FEDERAL REPORTER, PAGE 129.

ATTORNEY-GENERAL
v.
WESTERN UNION TELEGRAPH COMPANY.

(Circuit Court, D, Mass., November 28, 1887.)

1. Telegraph Companies—Taxation—Power of State.

Pub. St. Mass., c. 13, sec. 40 provides that every railroad and telegraph company shall pay annually a tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock, after deducting from such valuation such portion as is apportionate to the length of the line lying without the state; and also an amount equal to the value of the real estate and machinery located and subject to local taxation within the state. Held, that the right to tax telegraph companies under this statute is not impaired by Rev. St. W. S. secs. 5263–5266, conferring certain privileges on telegraph companies.

2. Constitutional Law—Interstate Commerce—Taxation of Telegraph Companies.

A tax levied under Pub. St. of Mass., c. 13, sec. 40, providing for the taxation of railroad and telegraph companies is not void as repugnant to the Const. U. S., Art. 1, sec. 8, which gives congress power to regulate commerce between the several states.

(Sub-note 1. Respecting interstate commerce in general see Pearson *v.* Distillery Co. (Iowa), 34 N. W. Rep. 1 and note.)

In Equity.

Harvey N. Shepard, Ass't Att'y General, for complainant.
Geo. S. Hale, for defendant.

COLT, *Justice:*

135 This is an information filed by the attorney general of Massachusetts under section 54, chapter 13, of the Public Statutes of Massachusetts, to collect a tax claimed to be due, and for an injunction restraining the defendant from the further prosecution of its business until such tax is paid.

The defendant is a telegraph company, organized under the laws of the State of New York, for the purpose of business and profit, and having a capital stock divided into shares. On or about June 12, 1867, the company filed its written acceptance with the postmaster general of the United States of the restrictions and obligations required by the act of congress of July 24, 1866, relating to telegraphs.

Rev. St. secs. 5263–5269. By section 6263 it is provided that any telegraph company organized under the laws of any state shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States; over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under or across the navigable streams or waters of the United States. The information was originally filed in the state court April 27, 1886, and removed to this court by the defendant. On May 1, 1885, the defendant owned or controlled, under lease or otherwise, 146,052.60 miles of telegraph line, of which 2,833.05 were situate within the state of Massachusetts. In September, 1885, the tax commissioners, in the manner required by the laws of the state, estimated the fair cash valuation of the stock of the corporation on May 1, 1885, at $47,500,000, and allowed as credits for shares held by the company unissued and stocks in other companies outside of its system $8,773,622.70, leaving $38,713,924. The commissioner considered the valuation of the corporate franchise of

136 the defendant subject to taxation in the state to be $750,952, and he assessed a tax thereon of $10,618.46. More than 2,334.55 miles of the line within the state are over, under or across post roads, but the commissioner ignored this fact. The defendant has continually transmitted messages over its lines on said post roads between the several departments of the United States Government at rates fixed by the post-master general as required by the act of July 24, 1866. (Rev. St. sec. 5266.) It is impossible for the company to determine what portion of any sums received were for services performed in the state in the transmission through the state or any portion thereof of messages received or delivered out of it, or what portion of any sums received were for services not on lines of said post roads; but approximately 70% of the receipts were for messages received and delivered out of the state. The defendant on May 1, 1885, owned a large amount of real estate subject to local taxation out of the state of Massachusetts on which there was assessed and paid more than $48,000 of taxes. In the assessment of the tax herein complained of no allowance or deduction was made for this, and in ascertaining the valuation of the defendant's franchise for the purposes of taxation no account was taken of said real estate or buildings or the taxes paid thereon. The position taken by the defendant is that this tax levied under Chap. 13 of the Pub. Statutes of Massachusetts is illegal—*first:* Because of its operation and effect upon a franchise granted by the United States and used for its purposes and benefit; *second:* because it is a tax upon interstate or foreign commerce; *third:* because it *it* is in effect levied upon real estate located and taxed in another state. There is nothing in the act of July 24,

1866, conferring certain privileges on telegraph companies

137 who shall choose to take the benefit of its provisions, which impairs the right of a state to tax the property or franchise of the corporation in the manner exercised by the state of Massachusetts in the present case; nor is such a tax void as repugnant to sec. 8 of art. 1 of the Constitution, which gives congress power to regulate commerce with foreign nations and among the several states.

In Telegraph Co. *vs.* Texas, 105 U. S. 460, the Supreme Court held a state statute imposing a specific tax on each message which it transmitted beyond the state, or which a public officer sends over its lines on business of the United States was void so far as it was a tax on interstate business, or a tax by a state on the means employed by the United States to execute its constitutional powers. It will be observed that this was a direct tax on each message sent out of the state as well as a direct tax on messages sent by the government. In the present case, however, the tax is imposed upon the shares of capital stock which represent the property and franchise of the corporation. Every tax on the property or franchise of a telegraph company may operate to increase the cost of messages sent, but that does not make such a tax invalid. In the case just referred to Chief Justice Waite, speaking for the court, says: "The Western Union Telegraph Company having accepted the restrictions and obligations of this provision by congress, occupies in Texas the position of an instrument of foreign and interstate commerce and of a government agent for the transmission of messages on public business. Its property in the state is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper manner on account of its occupation and its business." The precise question now presented is
138 "whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out of the state, or sent by public officers on the business of the United States."

It was this last question that was determined in the negative. In the Delaware Railroad Tax Case, 18 Wall. 206, an act of the legislature of Delaware imposing a tax quite similar to the one now complained of was held not to conflict with the power of congress to regulate commerce. The court in that case observes: "The state may impose taxes on the corporation as an entity existing under its laws as well as upon the capital stock of a corporation or its separate corporate property. And the manner in which its valuation shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the state; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction."

The question of what constitutes a tax upon foreign or interstate commerce had frequently come before the Supreme Court for adjudication and I find no case which sustains the view taken by the defendant in this case. The question is carefully reviewed in the recent cases of Fargo *v.* Michigan, 121 U. S. 230; 7 Sup. Ct. Rep. 857, and Steamship Co. *vs.* Pennsylvania, 122 U. S. 326; 7 Sup. Ct. Rep. 1118.

Sec. 40, Chap. 13, Pub. Stat. of Massachusettts provides that every corporation embraced in the provision of sec. 38 shall pay a tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock at a certain rate deter-
139 mined as therein set forth, deducting in the case of railroads and telegraph companies whose lines extend beyond the limits

of the commonwealth such portion of the whole valuation of their capital stock as is proportional to the length of that part of their line lying within the commonwealth; and also an amount equal to the value, as determined by the tax commissioner, of their real estate and machinery located and subject to local taxation within the commonwealth; in case of other corporations an amount shall be deducted equal to the value of their real estate and machinery subject to local taxation wherever situate. The deductions in the case of corporations generally of all real estate and machinery wherever situate and in the case of railroad and telegraph companies whose lines extend beyond the limits of the commonwealth of only the real estate and machinery lying within the state, is a question of legislative discretion, and no valid ground has been suggested upon which this court for this reason has a right to declare a tax so levied invalid in whole or in part. I think a decree should be entered for the complainant and that an injunction as prayed for should be granted unless the amount taxed is paid by the defendant within 30 days from the entry of a decree in the cause. Decree for complainant.

United States Reports, October Term, 1887, No. 125, pages 530-555.

Western Union Telegraph Company
v.
The Attorney General of the Commonwealth of Massachusetts.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

No. 1325. Argued February 15, 1888. Decided March 19, 1888.

140 The privilege conferred upon telegraph companies by Rev. Stat. sec. 5263 carries with it no exemption from the ordinary burdens of taxation in a State within which they may own or operate lines of telegraph.

The laws of Massachusetts impose a tax upon the Western Union Telegraph Company on account of the property owned and used by it within that State, the value of which is to be ascertained by comparing the length of its lines in that State with the length of its entire lines; and such a tax is essentially an excise tax, and is not forbidden by the fact of the acceptance on the part of the company of the rights conferred on telegraph companies by Rev. Stat. sec. 5263, nor by the commerce clause of the Constitution.

The principles established by the statutes of Massachusetts for regulating the taxation of corporations doing business within its limits, whether domestic or foreign, do not appear to be unfair or unjust.

A state statute which authorizes an injunction to be issued to restrain a corporation organized under the laws of another State, whose taxes are in arrear, from prosecuting its business within the State until the taxes are paid, is void so far as it assumes to confer power upon a court to so restrain a telegraph company which has ac-

cepted the provisions of Rev. Stat. sec. 5263 from operating its lines over military and post roads of the United States.

In Equity. The bill was filed by the Attorney General of the Commonwealth of Massachusetts, at the relation of the Treasurer of that State, and on behalf of the Commonwealth, in the Supreme Judicial Court of that State on the 27th of April, 1886. It averred that certain proceedings had been taken in accordance with law and under the Statutes of that State, to assess taxes in that State
141 in the year 1885 upon the capital stock of the Western Union Telegraph Company, a corporation owning, controlling, and using, under lease, or otherwise, lines of telegraph within that Commonwealth for purposes of business or profit. The provisions in the Constitution and laws of Massachusetts which were relied upon are printed in the margin.*

(*) 1. *Extract from the Constitution of Massachusetts.*

Part 2, Ch. 1, Sect. 1, Art. 4, of the Constitution gives the Legislature power "to impose and levy proportional and reasonable assessments, rates and taxes, upon all the inhabitants of, and persons resident, and estates lying within the said Commonwealth," and also "to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise and commodities whatsoever, brought into, produced, manufactured or being within the same."

2. *Extracts from the Public Statutes of Massachusetts.*

"Chapter 13, Sect. 38. Every corporation chartered by the Commonwealth, or organized under the general laws, for the purposes of business or profit, having a capital stock divided into shares, excepting banks whose shares are otherwise taxable under this chapter, and except those specified in sections forty-three and forty-six, shall annually, between the first and the tenth day of May, return to the tax commissioner, under the oath of its treasurer, a complete list of its shareholders, with their places of residence, the number of shares belonging to each on the first day of May, the amount of the capital stock of the corporation, its place of business, the par value and market value of the shares on said first day of May. Such return shall, in the case of stock held as collateral security, state not only the name of the person holding the same, but also the name of the pledger and his residence. The returns shall also contain a statement in detail of the works, structures, real estate and machinery owned by said corporation and subject to local taxation within the commonwealth and of the location and value thereof. Railroad and telegraph companies shall return the whole length of their lines, and the length of so much of their lines as is without the commonwealth; other corporations required to make a return under this section shall also return the amount, value and location of all works, structures, real estate, and machinery owned by them and subject to local taxation without the commonwealth: *provided*, that nothing herein contained shall exempt any corporation from making all returns required by its charter.

"Sect. 39. The tax commissioner shall ascertain, from the returns

or otherwise, the true market value of the shares of each
142 corporation included in the provisions of the preceding section, and shall estimate therefrom the fair cash valuation of all of said shares constituting its capital stock on the first day of May next preceding, which shall be taken as the true value of its corporate franchise for the purposes of this chapter. He shall also ascertain and determine the value and amount of all real estate and machinery owned by each corporation, and subject to local taxation, and of the deductions provided in the following section; and for this purpose he may take the amount or value at which such real estate and machinery are assessed at the place where the same are located as the true amount or value; but such local assessment shall not be conclusive of the true amount or value thereof.

"SECT. 40. Every corporation embraced in the provisions of section thirty-eight shall annually pay a tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock, as determined in the preceding section, after making the deductions provided for in this section, at a rate determined by an apportionment of the whole amount of money to be raised by taxation upon property in the commonwealth during the same current year, as returned by the assessors of the several cities and towns under section eight'-six of chapter eleven, upon the aggregate valuation of all the cities and towns for the preceding year, as returned under sections fifty-four and fifty-five of said chapter: *provided*, that in case the return from any city or town is not received prior to the twentieth day of August, the amount raised by taxation in said city or town the preceding year, as certified to the secretary of the commonwealth, may be adopted for the purpose of this determination; and *provided, further*, that the amount of tax assessed upon polls the preceding year, as certified to the secretary, may be taken as the amount of poll tax to be deducted from the whole amount to be raised by taxation, for the purpose of ascertaining the amount to be raised by taxation upon property. From the valuation, ascertained and determined as aforesaid, there shall be deducted,—*First*, in case of railroad and telegraph companies, whose lines extend beyond the limits of the commonwealth, such portion of the whole valuation of their capital stock, ascertained as aforesaid, as is proportional to the length of that part of their line lying without the commonwealth, and also an amount equal to the value as determined by the tax commissioner, of their real estate and machinery located and subject to local taxation within the commonwealth: *second*, in case of other corporations, included in section thirty-eight of this chapter, an amount equal to the value, as determined by the tax commissioner, of their real estate and machinery, subject to local taxation, wherever situated: *Provided*, that, whenever the charter of a corporation pro-
vides a different method of ascertaining the valuation of its
143 corporate franchise for the purposes of this chapter, the same shall be ascertained in the method provided in such charter."

"SECT. 42. Every corporation or association chartered or organized elsewhere, which owns, or controls and uses, under lease or

otherwise, a line of telegraph within this commonwealth, shall make all the returns prescribed in section thirty-eight to be made by telegraph companies within the commonwealth excepting the list of its shareholders; and shall annually pay a tax at the same rate, and to be ascertained and determined in the same manner as is provided in section forty; and all telegraph lines within the commonwealth controlled and used by such corporation or association, shall for the purposes of this chapter, be taken and considered as part of its own lines."

"SECT. 53. The tax commissioner shall, as soon as may be after the first Monday in August in each year, notify the treasurer of each corporation, company, copartnership, or association liable thereto, of the amount of its tax under sections twenty-five, forty, forty-two, forty-five, forty-seven, fifty, and fifty-two, to become due and payable to the treasurer of the commonwealth within thirty days from the date of such notice: *provided*, that it shall not be due and payable earlier than the first day of November. Such notice shall also state that within ten days after the date thereof the said corporation, company, copartnership, or association may apply for a correction of said tax, and be heard thereon before the board of appeal hereinafter established.

"SECT. 54. Any corporation, company, copartnership, or association taxable under the provisions of sections forty, forty-two, forty-three, forty-five, forty-seven, fifty, and fifty-two, neglecting to make the returns required by this chapter, or refusing or neglecting, when required thereto, to submit to the examinations provided for therein, shall forfeit two per cent. upon the par value of its capital stock; all which penalties may be recovered by an action of tort, brought in the name of the commonwealth, either in the county of Suffolk or in the county where the corporation is located. If any corporation, company, copartnership, or association fails to pay the taxes required to be paid to the treasurer of the commonwealth under the provisions of said sections forty, forty-two, forty-three, forty-five, forty-seven, fifty, fifty-one, and fifty-two, he may forthwith commence an action of contract in his own name, as treasurer, for the recovery of the same, with interest at the rate of twelve per cent. per annum until the same are paid. All penalties under this section, and under sections seven, forty-seven, fifty, and fifty-two, may also be enforced, and all taxes under said sections forty, forty-two, forty-three, forty-five, forty-seven, fifty, fifty-one, and fifty-two, may also be collected by information brought in the supreme judicial court at the relation of the treasurer of the commonwealth, and upon such information the court may issue an injunction restraining the further prosecution of the business of the corporation, company, copartnership, or asso-
144 ciation, until all such taxes due or penalties incurred shall be paid, with interest at the rate aforesaid, and costs. In any proceeding under this section the certificate of the tax commissioner or his deputy shall be competent evidence of all determinations made and notices given by him and of all values, amounts, and other facts required to be fixed or ascertained by him under this chapter."

"SECT. 61. Any party aggrieved by the decision of the tax com-

missioner arising under the provisions of sections twenty-five to fifty-eight inclusive, excepting corporations named in section forty-six, may apply to the board of appeal constituted under the provisions of the following section for a correction of the same."

SECT. 62. The treasurer and the auditor of the commonwealth, together with one member of the council to be named by the governor, shall constitute a board of appeal, to which board any party aggrieved by a decision of the tax commissioner upon any matter arising under this chapter, from his decision upon which an appeal is given, may apply within ten days after notice of such decision for a correction of the same. Upon such appeal said board shall, as soon as may be, give a hearing to such party, and shall thereupon decide the matter in question, and notify the tax commissioner and the party appealing; and such decision shall be final and conclusive as to the rights of the parties affected, although payments may have been made as required by the decision of the tax commis-ioner appealed from. Any overpayment of tax, determined by the decision of said board of appeal, shall be reimbursed from the treasury of the commonwealth."

"CHAPTER 109, SECTION 1. Every company incorporated for the transmission of intelligence by electricity shall possess the powers and privileges, and be subject to the duties, restrictions, and liabilities, prescribed in this chapter."

"SECT. 2. Each company may, under the provisions of the following section, construct lines of electric telegraph upon and along the highways and public roads, and across any waters within the commonwealth, by the erection of the posts, piers, abutments, and other fixtures (except bridges) necessary to sustain the wires of its lines; but shall not incommode the public use of highways or public roads, nor endanger or interrupt the navigation of any waters."

"SECT. 3. The mayor and aldermen or selectmen of a place through which the lines of a company are to pass shall give the company a writing specifying where the posts may be located, the kind of posts, and the height at which and the place where the wires may run. After the erection of the lines, having first given the company or its agents opportunity to be heard, they may direct any alteration in the location or erection of the posts, piers, or abutments, and in the height of the wires. Such specifications and decisions shall be recorded in the records of the city or town."

145 The nature of the proceeding, in the valuation of the property of the company for the purposes of the assessment of the tax, are sufficiently stated in the Report of the Examiner *infra*.

The bill averred that the taxes had not been paid, and were still due and owing to the Commonwealth, and prayed the court "to order and decree that said sum due for taxes as aforesaid shall be paid to said Commonwealth by the said corporation, with interest thereon, together with the costs of this information, and to grant unto your informant a writ of injunction, issuing out of and under the seal of this honorable court, to be directed to the said corporation and its officers, agents, and servants, commanding them and each of them absolutely to desist and refrain from the further prosecution of the business of said corporation until said sums, due to the said Commonwealth as aforesaid for taxes as aforesaid shall have been fully paid, with interest and costs," and for further and other relief.

On motion of the defendant the cause was, on May 13, 1886, removed to the Circuit Court of the United States, and on the 29th day of the same May the answer of the defendant was filed in that court.

The answer set forth that the defendant was a corporation organized in the State of New York, and under the laws of that State; that it owned, controlled, and used many lines of telegraph in various parts of the United States, and in the State of Massachusetts, largely in that State over and along the post roads of the United States which had been declared to be such and over, under, and across navigable waters of the United States in or adjoining that State, and that on the 5th day of June, 1867, it had accepted the provisions and obligations of the act of July 24, 1866, 14 Stat. 221, c. 230

146 (now Rev. Stat. sec. 5263); (*) that thereby it became entitled to construct and maintain its lines over the post roads and over, under, and across the navigable waters of the United States, and became bound to transmit the telegrams of the United States over its lines at rates to be fixed by the Postmaster General, and that no state legislation could prevent its occupation of post roads for that purpose; that its lines extend to and from Massachusetts to other states, and to Washington, and connect with the lines of other companies doing business in this country and outside of the United States and beyond the seas; that while it was operating its lines in Massachusetts it was called upon to make returns of its capital stock, &c., to the tax commissioner of the State according to the provisions of secs. 38, 39, 40, 41, and 42 of c. 13 of the Public Statutes of the State, and made a return as follows:

(*) See *infra*, page 547, for this statute.

"Western Union Telegraph Company.

"TREASURER'S OFFICE, NEW YORK, *June* 25, 1885.

"Hon. Daniel A. Gleason, tax commissioner of the Commonwealth of Massachusetts.

"SIR: I, Roswell H. Rochester, treasurer of the Western Union Telegraph Company, hereby return that on the first day of May, 1885, said corporation held its principal place of business at the City of New York.

"Its capital stock was	$80,000,000.00
The whole number of its shares was 800,000.	
The par value of each share was	100.00
The market value of each share was	59.37½
The value of the real estate owned by the corporation without the State of Massachusetts was	3,058,933.82
147 The value of the real estate owned by the corporation within the State of Massachusetts was nothing.	
The total number of miles of line owned or leased was 146,052.60.	
Of which the number of miles (not on post roads of the United States and excluding 2,334.55 miles which were on post roads of the United States) within the State of Massachusetts was 498.50.	
Total property, 800,000 shares, at $59.37½ per share	47,500,000.00
This includes—	
Real Estate	3,058,933.82
Two hundred and nine three-fourth shares held by this company unissued, at $59.37½	12,453.90
Stocks in other companies outside of our system, not included in above statement of miles of line.	8,773,622.70
Balance value of 146,052.60 miles of line	35,654,989.58
Value, at same rate, of said 498.50 miles as the valuation of the corporate franchise of said company for taxation under the laws of Massachusetts	121,695.97

"This return includes the lines and property of the American Union Telegraph Company, the Franklin Telegraph Company, the Mutual Union Telegraph Company, and the Gold and Stock Telegraph Company as part of the Western Union lines.

"Respectfully yours, R. H. ROCHESTER,
Treasurer."

148 The answer then set forth the action of the tax commissioner upon this return and respecting the valuation of the property of the company for the purposes of taxation (*); and continued:

(*) For these proceedings see the Report of the Examiner, *infra*, pp. 539, 542.

"And this respondent does not deny but admits that its property in said State of Massachusetts is subject to taxation the same as other property, and that it may be taxed in a proper way thereon, yet it respectfully submits and avers that this respondent does not derive its existence from the laws of said State, or derive the right to have and exercise its said franchises, rights and privileges from said State, or hold them subject to its control, and that said franchise tax is clearly not a tax on its property in any legal sense, and cannot be held valid as such; that it is in the nature of an excise on the exercise of all the franchises, rights and privileges enjoyed by this respondent in the conduct of its business, and a tax on its operations in such exercise; that, while it is claimed by the officers of said State and by said attorney general that the laws imposing said tax are founded on the alleged right of said State to refuse to this respondent the right or permission to transact its business or exercise its functions, franchises, rights and privileges within said State, except for such price and on such terms and conditions, including the payment of such taxes as said State may see fit to prescribe and assess, and to compel the performance of, and to exclude this respondent from such transaction or exercise if the same are not performed and obeyed:

"Yet this respondent avers that said franchise tax has not and cannot have this or any legal foundation, and that it includes and is a tax or assessment on the rights, privileges and franchises
149 granted and secured to this respondent by the United States by the said act of Congress, and on the use thereof by this respondent as an instrument of commerce and as a government agent for the transmission of public business by means thereof, and on its operation in said State, which said State cannot limit, control, refuse, or tax.

"That even if said tax could in any form be so properly levied and assessed on the use of such rights and privileges for other purposes, which this respondent denies, it is not only impossible in this case to indicate or designate the portion of the burden of said franchise tax on said use as an instrument of commerce and as a government agent or on any use for other purposes, but that the mode of valuation thereof specifically prescribed by said act does in terms include and designate as a subject of taxation the franchise exercised on that portion of this respondent's lines constructed, maintained and used in the exercise and enjoyment of said rights and privileges, and that the said tax bears upon the whole machine without distinction and indistinguishably as well upon the faculty of receiving and transmitting the messages of the government of said United States as on that of receiving and transmitting messages of individuals, and as well upon the faculty of receiving and transmitting through said State messages sent and received in and for the purposes of foreign and interstate commerce, as upon that of receiving and transmitting other messages wholly within said State.

"And this respondent further avers that if said franchise tax could in form be legally so levied and assessed as to operate upon only something legally subject to taxation by said State by any mode of

estimate or valuation resembling that prescribed by said laws,
150 based upon a valuation of its shares, deducting real estate locally taxed in said State, it would be and is unjust and not proportional not to deduct from said valuation the amount of real estate owned by and subject to local taxation and actually taxed out of said State, both because the laws of said State allow such deduction from the valuation under said laws for like taxation of the franchises of other corporations organized or chartered within and doing business within and without said State, and because otherwise said State would assume and does assume in effect to tax and assess real estate situated in and subject to taxation and actually taxed by other States and jurisdictions."

The plaintiff filed a replication to this answer; whereupon the cause was referred to Francis S. Fiske, Esq., "as Examiner, to take and report the evidence of both parties therein, and such questions of law arising thereon as either party shall desire." The Examiner's report was filed May 4, 1887, as follows:

"I, Francis S. Fiske, having been appointed by the Court a special examiner in the above-named case, report:

"That the information was filed in the Supreme Judicial Court of the State April 27, 1886, and removed to this court by the defendant; that the defendant is a telegraph company organized under the laws of the State of New York before the passage of the act of the Congress of the United States of July twenty-fourth, eighteen hundred and sixty-six, entitled 'An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes' (Rev. Stat., sec. 5263, *et seq.*), and is a corporation organized for purposes of
151 business and profit, having a capital stock divided into shares, which filed with the Postmaster-General of the United States its written acceptance of the restrictions and obligations required by law in accordance with said act on or about the twelfth day of June, 1867, and has ever since been in existence and operation.

"That on and before and since the first day of May, 1885, it has owned, controlled and used, under lease or otherwise, a line or lines of telegraph within said Commonwealth as part of a system of 146,052 and 60/100 miles of line extending throughout the United States, part of Canada, and to Cuba and England by submarine ocean cable, connecting with lines owned and established by the Government of the United States for public purposes.

"That on the sixteenth day of September, in said year 1885, after notice had been given to said Commonwealth of said filing and of other matters mentioned in the notice hereto appended, as below stated, and a return made by said company, under section 42 of chapter 13 of the Public Statutes of said Commonwealth, copies of which notice and return are appended (see pp. 536, 537, *supra*), the tax commissioner of said Commonwealth, in the manner required by its laws, estimated the fair cash valuation of all the shares constituting the capital stock of said corporation on said first day of May at $47,500,000, and allowed as credits to said corporation out of said $47,500,000 the sum or value of $8,786,076.

For 209¾ shares held by the company unissued, at $59.37½	$12,453.90
For stock in other companies outside of its system not included in above statement of miles of line	8,773,622.70
	$8,786,076.60

152 "And determined the total number (or whole length) of the miles of line of said defendant to be 146,052.60 as aforesaid and 143,219.55 miles thereof, which included said cables, to be beyond the limits of said Commonwealth.

"That the rate determined under the fortieth section of said thirteenth chapter of said Public Statutes for the taxation of the corporate franchise therein mentioned was, in and for the year 1885, $14.14 each for each $1,000 of valuation.

"That said commissioner, being of opinion that the valuation of the corporate franchise of said defendant for taxation by said Commonwealth was to be ascertained by deducting

from said	$47,500,000.00
The said	8,786,076.00
Thus leaving	$38,713,924.00
And then taking as the total number of said line or lines	146,052.60
And as the number thereof in said Commonwealth	2,833.05

without regard to the question whether any thereof were or were not on post roads, declared such by law, or navigable streams or waters of the United States, considered that the valuation of the corporate franchise of said defendant subject to be taxed in said Commonwealth at said rate was $\frac{2,833.05}{140,052.60}$ of said $38,713,924, or in all ($750,952) seven hundred and fifty thousand nine hundred and fifty-two dollars, and assessed a tax thereon of ($10,618.46) ten thousand six hundred and eighteen and 46/100 dollars to said company.

"That in fact more than 2,334.55 miles of said line within said Commonwealth, part of said 2,833.05 miles, were on, over, under, or across said post roads—that is to say, railroads or highways

153 made by law such post roads—or such streams or waters.

"That before and during said year and since said defendant has continually transmitted over said lines on said post roads, streams, or waters between the several departments of the United States government and their officers and agents or as provided by sec. 221 of the Revised Statutes of the United States, at rates fixed by the Postmaster-General, as required by said act of Congress or title LXV. of said section, telegraphic communications and messages for the government of the United States, including those for the signal service relating to the weather, storms, etc., and also commercial and business messages for purposes of foreign and interstate commerce from and to, into, through, and over and between said State of Massachusetts and all the other States and Territories of the United States, the city of Washington, and the District of Columbia, and to and from

foreign countries by ocean submarine cables both for said government and for many private individuals and corporations resident and located as well out of as in said State.

"That it is impossible for said company to determine what portion of any sums received by it was received for services performed in said State in the transmission through the same or any part thereof of messages or communications received or delivered out of it or not on lines over said post roads, streams, or waters, but that the largest part, or approximately seventy per cent., of said sums was for messages received or delivered out of said State.

"That said defendant, on said first day of May, 1885, owned a large amount of real estate located and subject to local taxation out of said State of Massachusetts, on which there was assessed and paid
154 by it a large amount (over $48,000) of taxes, besides other taxes.

"That the amount or value of said real estate was not clearly shown, but it was shown that the cost of land and buildings thereon owned by the defendant and of buildings so owned on land not so owned out of said State was over $3,000,000; and it was agreed by the said parties that if it appeared and became material upon any final decision in this case to fix the amount or value of said real estate, or the taxes thereon, or the amount received for any class of messages, and it was not agreed upon by them, the same should be determined on further hearing by the examiner.

"That no deduction or allowance was made in assessing said tax or in ascertaining the valuation of said franchise for taxation as aforesaid on account of said real estate, land, or buildings, or the taxes paid thereon, or for anything not above specifically stated.

"That notice was duly given to said defendant of said tax, and demand made therefor as required by said chapter, but said defendant protested against said assessment and tax and declined to pay the same; whereupon this information was filed."

The cause was heard on these pleadings and upon the report of the Examiner, and the court on the 28th November, 1887, made a final decree therein:

"That the facts set forth in the examiner's report filed in this cause are true.

"That on those facts the method of valuation, assessment, and taxation provided by the laws of Massachusetts upon the franchise of the defendant corporation is not, as was claimed, and contended by said defendant, illegal and unconstitutional under the con-
155 stitution and laws either of the State of Massachusetts or of the United States—that is to say, either under the Constitution of the United States, Article I, section 8; Article III, section 2; Article VI; Amendments V and XIV; Revised Statutes of the United States, sections 5263, 5264, 5265, 5266, 5267, 5268, 5269, including a revision and consolidation of the act of July 24, 1866, chapter 230, accepted by the defendant before the revision of section 221; or under the constitution of said State, Part I, art. X; Part II, chapter I, section IV; or chapter 13 of its Public Statutes, but was and is in conformity with and authorized by said constitutions and laws, and that

therefore the sum claimed by the plaintiff to be due for taxes, to wit, $10,618.46, be paid to said State by said corporation, with interest thereon, and that an injunction shall be issued out of and under the seal of this court, directed to said corporation and its officers, agents, and servants, commanding them and each of them absolutely to desist and refrain from the further prosecution of the business of said corporation until said sums due to the said Commonwealth as aforesaid for taxes as aforesaid shall have been fully paid, with interest and costs, unless the said sum is paid by said defendant as aforesaid within thirty days from the entry hereof."

From this decree the defendant appealed.

Mr. George S. Hale (with whom were Mr. Charles W. Wells and Mr. Willard Brown on the brief).

I. Telegraph companies, which have accepted the act of Congress, are, as to government business, government agencies, and so far as a state tax on a company is on, or affects, the means employed by the government of the United States to exercise its consti-
156 tutional powers, it is void. Western Union Telegraph Co. *v.* Texas, 105 U. S., 460; Osborn *v.* Bank of the United States, 9 Wheat. 738; Union Pacific Railroad *v.* Peniston, 18 Wall. 5; McCulloch *v.* Maryland, 4 Wheat. 316; Bank of Commerce *v.* New York, 2 Black, 620; Weston *v.* Charleston, 2 Pet. 449; Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S. 1; Mayor *v.* Charleston, 36 Georgia, 460; Wabash, &c., Railway Co. *v.* Illinois, 118 U. S. 557; Fargo *v.* Michigan, 121 U. S. 230; Pickard *v.* Pullman Southern Car Co., 117 U. S. 34; Manufacturers' Ins. Co. *v.* Loud, 99 Mass., 146; Hamilton Manufacturing Co. *v.* Massachusetts, 6 Wall. 632; Provident Institution *v.* Massachusetts, 6 Wall. 611; Portland Bank *v.* Apthorp, 12 Mass. 252; Commonwealth *v.* People's Five Cent Savings Bank, 5 Allen, 428; Bank of Augusta *v.* Earle, 13 Pet. 519; Attorney General *v.* Bay State Mining Co., 99 Mass. 148; Gleason *v.* McKay, 134 Mass., 419; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196; Philadelphia Steamship Co. *v.* Pennsylvania, 122 U. S. 326; People *v.* Weaver, 100 U. S. 539; Robbins *v.* Shelby County Taxing District, 120 U. S. 489.

II. The omission to deduct from the total valuation the real estate located and subject to local taxation in other States, renders the tax excessive and invalid. The Delaware Railroad Tax, 18 Wall. 206; Santa Clara County *v.* Southern Pacific Railroad, 118 U. S. 394; Libby *v.* Burnham, 15 Mass. 144; Stetson *v.* Kempton, 13 Mass. 272.

Mr. Andrew J. Waterman, Attorney General of the Commonwealth of Massachusetts, and Mr. Henry C. Bliss, Assistant Attorney General of that State cited: Portland Bank *v.* Apthorp, 12 Mass. 252; Commonwealth *v.* Savings Bank, 5 Allen, 428; Common-
157 wealth *v.* Hamilton Manuf. Co., 12 Allen, 298, 305, 309; Queen *v.* Arnaud, 9 Q. B. 806, 817; Utica *v.* Churchill, 33 N. Y. 161, 237; Van Allen *v.* Assessors, 3 Wall. 573; Attorney General *v.* Bay State Mining Co., 99 Mass. 148; Bank of Commerce *v.* New York, 2 Black, 620, 630; Delaware Railroad Tax Case, 18 Wall. 206, 225; State Tax on Railway Gross Receipts, 15 Wall. 284, 293;

Wabash, &c., Railroad *v.* Illinois, 118 U. S. 557, 594; Sherlock *v.* Alling, 93 U. S. 99; Munn *v.* Illinois, 94 U. S. 113; Chicago, Burlington, &c., Railroad *v.* Iowa, 94 U. S. 155; Paul *v.* Virginia, 8 Wall. 168; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 209; Railroad Co. *v.* Peniston, 18 Wall. 5, 34; Commonwealth *v.* Lancaster Savings Bank, 123 Mass. 493, 495; Woodruff *v.* Parhams, 8 Wall. 123; Manufacturers' Ins. Co. *v.* Loud, 99 Mass. 146; Oliver *v.* Washington Mills, 11 Allen, 268, 279; Hamilton Co. *v.* Massachusetts, 6 Wall. 632, 639; Dickey *v.* Turnpike Road Co., 7 Dana, 113; Thomson *v.* Pacific Railroad Company, 9 Wall. 579, 590; Fargo *v.* Michigan, 121 U. S. 230; Cooley *v.* Philadelphia, 12 How. 299; *Ex Parte* McNeil, 13 Wall. 236; Osborne *v.* Mobile, 16 Wall. 479, 481; McCulloch *v.* Maryland, 4 Wheat. 316, 429; Dwight *v.* Boston, 12 Allen, 316; S. C. 90 Am. Dec. 149; Railroad Company *v.* Fuller, 17 Wall. 560, 568.

Mr. Justice MILLER delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Massachusetts.

The action was commenced in the Supreme Judicial Court of Massachusetts, sitting in equity, by an information on behalf of the Commonwealth, by its Attorney General, at the relation of the Treasurer thereof, Alanson W. Beard. It was afterwards removed,
158 upon motion of the defendant, the Western Union Telegraph Company, into the Circuit Court of the United States. The object of the information was to enforce the collection of a tax levied by the proper authorities of the State upon the telegraph company, and to enjoin it from the further operation of its telegraph lines within the territorial limits of the Commonwealth until that tax was paid.

The defendant company is a corporation organized under the laws of the State of New York, having its capital stock divided into shares. The tax assessed by the treasurer of the Commonwealth of Massachusetts was based upon an estimate of $750,952 as the taxable value of the shares of the corporation apportioned to that State, the rate of taxation having been determined for that year, 1885, at $14.14 for and upon each $1,000 of valuation. The mode by which this taxable valuation was arrived at was this: The treasurer ascertained from the officers of the telegraph company that the valuation of its entire capital stock was $17,500,000, from which were deducted the credits proper to be allowed in determining the assessable value, leaving $38,713,924 as the total valuation of said stock liable to taxation. It was then ascertained that the total number of miles of line of said corporation in all the States and Territories of this country was 146,052.60, of which 143,219.55 were without the limits of the Commonwealth of Massachusetts, leaving 2,833.05 miles within its boundaries. Taking these figures the Treasurer of the State assessed the value of that portion of the capital stock of this company which, under this calculation, would fall within the Commonwealth of Massachusetts at the sum of $750,952. The amount thus arrived at, at the rate of $14.14 upon each $1,000 of valuation, produced the

sum of $10,618.46 as the amount of the tax claimed to be
159 due and payable to the treasurer of said Commonwealth by
that corporation. This sum was demanded of the telegraph company, but it refused to pay the same.

The answer of the defendant corporation set up that of its 2,833.05 miles of line within the State of Massachusetts more than 2,334.55 miles were over, under, or across post-roads, made such by the United States, leaving only 498.50 miles not over or along such post-roads, on which the company offered to pay the proportion of the tax assessed according to mileage by the state authorities.

The main ground on which the telegraph company resisted the payment of the tax alleged to be due, and on which probably the case was removed from the state court into the Circuit Court of the United States, is that it is a violation of the rights conferred on the company by the act of July 24, 1866, now Title LXV, §§ 5263 to 5269 of the Revised Statutes. The defendant alleges that it had accepted the provisions of that law, and filed a notification of such acceptance with the Postmaster General of the United States, June 8, 1867. The argument is, therefore, that by virtue of sec. 5263 the company has a right to exercise its functions of telegraphing over so much of its lines as is connected with the military and post-roads of the United States which have been declared to be such by law without being subject to taxation therefor by the state authorities. That section reads as follows:

"SEC. 5263. Any telegraph company now organized, or which may hereafter be organized under the laws of any State, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United
States, over and along any of the military or post-roads of the
160 United States which have been or may hereafter be declared
such by law, and over, under, or across, the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post-roads."

It is urged that this section, upon its acceptance by this corporation or any of like character, confers a right to do the business of telegraphing which is transacted over the lines so constructed over or along such post-roads, without liability to taxation by the State. The argument is very much pressed that it is a tax upon the franchise of the company, which franchise being derived from the United States by virtue of the statute above recited cannot be taxed by a State, and counsel for appellant occasionally speak of the tax authorized by the law of Massachusetts upon this as well as all other corporations doing business within its territory, whether organized under its laws or not, as a tax upon their franchises. But by whatever name it may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the corporation. The laws of that Commonwealth attempt to ascertain the just amount which any corporation engaged in business within its limits shall pay

as a contribution to the support of its government upon the amount and value of the capital so employed by it therein.

The telegraph company, which is the defendant here, derived its franchise to be a corporation and to exercise the function of telegraphing from the State of New York. It owes its existence, its capacity to contract, its right to sue and be sued, and to exercise the business of telegraphy, to the laws of the State under which it is organized. But the privilege of running the lines of its wires
161 "through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States, * * * and over, under, or across the navigable streams or waters of the United States," is granted to it by the act of Congress. This, however, is merely a permissive statute, and there is no expression in it which implies that this permission to extend its lines along roads not built or owned by the United States, or over and under navigable streams, or over bridges not built or owned by the Federal government, carries with it any exemption from the ordinary burdens of taxation.

While the State could not interfere by any specific statute to prevent a corporation from placing its lines along these post-roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the State for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person would be. It never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support.

In the case of Telegraph Co. *v.* Texas, 105 U. S. 460, this question was very fully considered, and while a tax imposed upon every telegram passing over its lines, whether entirely within the State or coming from without its limits, or going from the State out of it, was held to be void so far as related to messages passing through more than one State, as an interference with or regulation
162 of commerce and with the act of Congress we have just been considering, it was distinctly pointed out that if it could be ascertained what telegrams were confined wholly within the State a tax on those might be imposed by it.

In that case the Chief Justice, delivering the opinion of the court, said:

"The Western Union Telegraph Company having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a government agent for the transmission of messages on public business. Its property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business. The precise question now presented is whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out

of the State, or sent by public officers on the business of the United States." pp. 464, 465.

This authority of the government gives to this telegraph company, as well as to all others of a similar character who accept its provisions, the right to run their lines over the roads and bridges which have been declared to be post-roads of the United States. If the principle now contended for be sound every railroad in the country should be exempt from taxation because they have all been declared to be post-roads and the same reasoning would apply with equal force to every bridge and navigable stream throughout the land. And if they were not exempt from the burden of taxation simply because they were post-roads, they would be so relieved whenever a telegraph company chose to make use of one of these roads or bridges along or over which to run its lines. It was to provide against the recognition of such a principle that this court, in the case above cited,
163 while holding that telegrams themselves coming from without a State or sent out of it as a part of their conveyance could not be taxed by the State specifically, nevertheless used the language that "its property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business."

A still stronger case in the same direction is that of Railroad Company *v.* Peniston, 18 Wall. 5. The plaintiff in that action, the Union Pacific Railroad Company, was incorporated under a law of the United States. The State of Nebraska, under a revenue law passed by its legislature, undertook to lay a tax upon the property of that company which was used or embraced within the limits of its territory, upon a valuation of $16,000 per mile. The property thus rated and taxed consisted of its road beds, depots, stations, *telegraph poles, wires,* bridges, etc. It will be here observed that a part of the valuation on which this tax was levied was made up of the telegraph poles and wires belonging to the company.

The argument was pressed in that case that the railroad company held its franchises from the government of the United States, and that its property could not be taxed by the State, but this court held otherwise, and in the opinion used this language:

"It is often a difficult question whether a tax imposed by a State does in fact invade the domain of the general government, or interfere with its operations to such an extent, or in such a manner, as to render it unwarranted. It cannot be that a State tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the Constitution. To hold that
164 would be to deny to the States all power to tax persons or property. Every tax levied by a State withdraws from the reach of Federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which Federal taxes may be laid. The States are, and they must ever be, co-existent with the national government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the States, or prevent their efficient exercise" pp. 30, 31.

In the case of Thomson *v.* Pacific Railroad Co., 9 Wall. 579, is then cited, where it was held that the property of that company was not exempt from state taxation, though their railroad was a part of a system of roads constructed under the authority and direction of the United States, and largely for the uses and to serve the purposes of the general government. The court further said:

"A very large proportion of the property within the States is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. United States mails, troops and munitions of war are carried upon almost every railroad. *Telegraph lines* are employed in the national service. So are steamboats, horses, stage coaches, foundries, ship yards and multitudes of manufcaturing establishments. They are the property of natural persons or of corporations, who are agents or instruments of the general government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to
165 the revenue of the States it is manifest the state governments would be paralyzed. While it is of the utmost importance that all the powers vested by the Constitution of the United States in the general government should be preserved in full efficiency, and while recent events have called for the most unembarrased exercise of many of those powers, it has never been decided that state taxation of such property is impliedly prohibited." p. 33.

In National Bank *v.* Commonwealth, 9 Wall 353, which was a case of a tax levied upon the shares of a national bank, the same objection in regard to a tax by state authority was pressed upon the court, but this court said that the principle of exemption of Federal agencies from state taxation has a limitation growing out of the necessity upon which the principle is founded. "That limitation is, that the agencies of the Federal government are only exempted from state legislation, so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers into an unauthorized and unjustifiable invasion of the rights of the States. * * * So of the banks. They are subject to the laws of the State and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State law. Their acquisition and transfer of property, their right to collect their debts and their liability to be sued for debts are all based on State laws. It is only when the State law incapacitates the banks from discharging
166 their duties to the government that it becomes unconstitutional. We do not see the remotest probability of this in their being required to pay the tax which their stockholders owe to the State for the shares of their capital stock, when the law of the Federal government authorized the tax." p. 362.

The tax in the present case, though nominally upon the shares of the capital stock of the company, is in fact a tax upon that or-

ganization on account of property owned and used by it in the State of Massachusetts, and the proportion of the length of its lines in that State to their entire length throughout the whole country is made the basis for ascertaining the value of that property. We do not think that such a tax is forbidden by the acceptance on the part of the telegraph company of the rights conferred by sec. 5263 of the Revised Statutes, or by the Commerce clause of the Constitution.

It is urged against this tax that in ascertaining the value of the stock no deduction is made on account of the value of real estate and machinery situated and subject to local taxation outside of the Commonwealth of Massachusetts. The report of Examiner Fiske to whom the matter was referred to find the facts, states that the amount of the value of said real estate outside of its jurisdiction was not clearly shown, but it did appear that the cost of land and buildings belonging to the company and entirely without that State was over three millions of dollars. In the statement of the treasurer of the company it is said that the value of real estate owned by the company within the State of Massachusetts was nothing. Since the corporation was only taxed for that proportion of its shares of capital stock which was supposed to be taxable in that State on the calculation above referred to, and since no real estate of the corporation was
167 owned or taxed within its limits, we do not see why any deduction should be made from the proportion of the capital stock which is taxed by its authorities. But if this were otherwise we do not feel called upon to defend all the items and rules by which they arrived at the taxable value on which its ratio of percentage of taxation should be assessed and even in this case, which comes from the Circuit Court, and not from that of the State, we think it should appear that the corporation is injured by some principle or rule of the law not equally applicable to other objects of taxation of like character. Since, therefore, this statute of Massachusetts is intended to govern the taxation of all corporations therein, and doing business within its territory, whether organized under its own laws or those of some other State, and since the principle is one which we cannot pronounce to be an unfair or an unjust one, we do not feel called upon to hold the tax void, because we might have adopted a different system had we been called upon to accomplish the same result.

It is very clear to us when we consider the limited territorial extent of Massachusetts, and the proportion of the length of the lines of this company in that State to its business done therein, with its great population and business activity, that the rule adopted to ascertain the amount of the value of the capital engaged in that business within its boundaries, on which the tax should be assessed, is not unfavorable to the corporation, so that the details of the method by which this was determined have not exceeded the fair range of legislative discretion. We do not think that it follows necessarily, or as a fair argument from the facts stated in the case, that there was injustice in the assessment for taxation.

168 The result of these views is that the tax assessed against the plaintiff in error is a valid tax; that the judgment of the

court below, "That the sum claimed by the plaintiff (below) to be due for taxes, to wit, $10,618.46, be paid to said State by said corporation, with interest thereon," is without error, and so much of said judgment is hereby affirmed.

The decree or judgment, however, proceeds and awards an injunction against the company in the following language, added to that above extracted; "and that an injunction shall be issued out of and under the seal of this court, directed to said corporation and its officers, agents, and servants, commanding them, and each of them, absolutely to desist and refrain from the further prosecution of the business of said corporation until said sums due to the said Commonwealth for taxes, as aforesaid, shall have been fully paid, with interest and costs, unless the said sum is paid by said defendant within thirty days from the entry hereof."

The effect of this injunction, if obeyed, is to utterly suspend the business of the telegraph company and defeat all its operations within the State of Massachusetts. The act of Congress says that the company accepting its provisions "shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States." It is found in this case that 2334.55 miles of the company's lines, out of 2833.05, on which this tax is assessed, are along and over such post-roads, and, of course, the injunction prohibits the operation of the defendant's telegraph over these lines, nearly all it has in the State.

If the Congress of the United States had authority to say
169 that the company might construct and operate its telegraph over these lines, as we have repeatedly held it had, the State can have no authority to say it shall not be done. The injunction in this case, though ordered by a Circuit Court of the United States, is only granted by virtue of section 54 of chapter 13 of the Public Statutes of Massachusetts. If this statute is void, as we think it is, so far as it prescribes this injunction as a remedy to enforce the collection of its taxes by the decree of the court awarding it, the injunction is erroneous.

In holding this portion of section 54 of chapter 13 of the Massachusetts statutes to be void as applicable to this case, we do not deprive the State of the power to assess and collect the tax. If a resort to a judicial proceeding to collect it is deemed expedient, there remains to the court all the ordinary means of enforcing its judgment —executions, sequestration, and any other appropriate remedy in chancery.

That part of the decree of the Circuit Court which awards the injunction is, therefore, reversed, and the case is remanded to that court for further proceedings in conformity to this opinion.

Mr. Justice Bradley was not present at the argument of this case and took no part in its decision.

170 "EXHIBIT D" FOR IDENTIFICATION.

LAWS OF NEW JERSEY FOR THE TAXATION OF RAILROAD AND CANAL PROPERTY. GENERAL PUBLIC LAWS OF 1888, PAGES 269-287.

CHAPTER CCVIII.

"An Act to Revise and Amend 'An Act for the Taxation of Railroad and Canal Property,' Approved April Tenth, One Thousand Eight Hundred and Eighty-four.

1. *Be it enacted by the Senate and General Assembly of the State of New Jersey*, That all the property of any railroad or canal company not used for railroad or canal purposes shall be assessed and taxed by the same assessors and in the same manner and at the same rate as the taxable property of other owners in the same municipal division or taxing district; all other property of any railroad or canal company shall be assessed and taxed as hereinafter directed; the tax imposed by this act shall be in lieu of all other taxation upon the property subject to taxation under the provisions of this act; in all cases where the real estate, tangible personal property and franchise of any company are assessed and taxed under this act, the shares of stock and the bonds and certificates of indebtedness of such company shall not be taxed in the hands of the shareholders, bondholders or creditors, except as hereinafter provided.

2. (Amended by General Public Laws of 1891, Chapter 98, Page 165.)

3. *And be it enacted*, That it shall be the duty of the board of assessors to meet at Trenton on the first Tuesday of May in the present and each succeeding year and as often during each year and
171 at such places as their duties may require; they shall proceed to ascertain the true value of all property used for railroad or canal purposes of each railroad and of each canal company in this state, including its franchises, and they shall, in such ascertainment, ascertain:

I. The length and value of the main stem of each railroad, and of the water-way of each canal and the length of such main stem and water-way in each taxing district;

II. The value of the other real estate used for railroad or canal purposes in each taxing district in this state, including the road-bed (other than main stem), water-ways, reservoirs, tracks, buildings, water-tanks, water-works, riparian rights, docks, wharves and piers, and all other real estate, except lands not used for railroad or canal purposes;

III. The value of all the tangible personal property of each railroad and each canal company;

IV. The value of the remaining property, including the franchise.

The term 'main stem' of each railroad and of each canal company, as used in this act, shall be held to include the road-bed not exceeding

one hundred feet in width, with its rails and sleepers, depot buildings used for passengers connected therewith; the term 'water-way' shall be held to include the towing-path and berme-bank; the term 'taxing district' shall be held to designate any municipality, city, township, borough, incorporated town or village having power to assess and levy taxes, through which any road or canal may run; the term 'tangible personal property' shall be held to include the rolling-stock, cars, locomotives, ferryboats, all machinery, tools, other tangible per-
172 sonal property of any railroad company, and the floating, movable and other tangible personal property of any canal company, and also the locomotives and cars not belonging to such railroad company but built for its use and actually used in this state, or run under its control in this state by a sleeping-car company or other company; but the rolling stock of other persons or corporations temporarily used on any such road, and the floating or movable property temporarily used on such canal, but not forming part of the equipment of such road or canal, shall not be included in said term.

4. *And be it enacted*, That it shall be the duty of the assessors in all taxing districts where property of any railroad or canal company not used for railroad or canal purposes shall be assessed, if required so to do by the state board of assessors, to certify and send to the state board of assessors, on or before the second Monday of June in each year, a statement giving the description of such property and showing the assessed valuation thereof; the local assessors shall also, at the same time, certify and send to the state board of assessors a short description of all the real property in their respective taxing districts, used or owned for railroad or canal purposes, excepting the main stem or road-bed and track, not exceeding one hundred feet in width of each railroad, and the water-way, towing-path and berme-bank, not exceeding one hundred feet in width of each canal; the said assessors shall also certify to the said board the local rate of taxation for county and municipal purposes, as soon as the same shall be determined, and such other information obtained in the course of the performance of the duties of their office as the said board shall re-
173 quire of them, and for the service mentioned in this section the said local assessors shall receive three dollars per day for each day actually engaged in such service, to be paid on the warrant of the comptroller, on an affidavit of such service being filed in the office of said comptroller.

5. *And be it enacted*, That on the first Monday of July the board shall meet at the state house, in Trenton, and shall give a hearing to all companies interested, touching the valuation and assessment of their property; the board may adjourn from day to day, and may, if they see fit, require all arguments and communications to be presented in writing; when the first Monday of July shall fall on the fourth of fifth day of that month, the day of meeting shall be on the first Tuesday of July; all parties interested shall take notice of this hearing.

6. *And be it enacted*, That if the property of any railroad or canal company be leased to or operated by any other corporation, foreign

or domestic, the property of the lessor, or company whose property is operated, shall be subject to taxation in the manner hereinbefore directed, and if the lessee or operating company, being a foreign corporation, be the owner or possessor of any property in this state other than that which it derives from the lessor or company whose property is operated, it shall be assessed in respect of such property in like manner as any domestic railroad or canal company; any tangible personal property of such foreign company, if used or kept but a part of the time in this state, shall be assessed such proportionate part of its value as the time it is used or kept in this state during the calendar year preceding bears to the whole year.

7. *And be it enacted*, That in case any railroad or canal
174 company shall claim any deduction on account of any mortgage or debt secured thereby, the said board are hereby required to allow the same in the cases in which and to the extent to which the assessor is authorized by law to allow a deduction in the case of any other owner of mortgaged lands, and thereupon the said mortgage and the estate of the mortgagee in the land mortgaged shall be subject to taxation in the same manner, as nearly as may be, and at the same rate or rates, as the estate of the mortgagor; the deduction shall be made *pro rata* from the valuation of each class of property covered by the mortgage, and the amount received from the taxation thereof shall be distributed as if the tax had been paid by the mortgagor without deduction.

8. *And be it enacted*, That if any railroad or canal company shall claim a deduction in any case in which such deduction could be claimed under the general laws of the state by other taxpayers for debts other than the deduction last hereinbefore mentioned, the said board are hereby required to allow the same and the said indebtedness so allowed shall be taxable as other debts owing to creditors residing in this state are taxable, and at the same rate; but the assessment thereof shall be made by said board and not by the local assessor, and the tax shall be paid to the treasurer of the state, to the credit of the fund derived from taxation under this act; the deduction shall be made *pro rata* from the valuation of each class of property of the debtor assessed, and shall be distributed as if the tax had been paid by the debtor without deduction; *provided*, that no deduction, either for mortgage or other indebtedness, shall be allowed unless the same shall be applied for in the report and statement required to be made pursuant to this act, and unless the
175 nature of the indebtedness, and the name and residence of the creditor, and the different taxing districts in which the mortgaged land lies, shall be specified, and unless the other terms imposed by the general laws of the state upon other taxpayers claiming deduction shall be complied with.

9. *And be it enacted*, That the state board of assessors shall, upon the completion of their valuation and assessment, proceed to compute the tax upon the entire assessed valuation of each railroad company and of each canal company, as ascertained by them; upon such valuation, each company shall pay to the state, for general state purposes, a tax at the rate of one-half of one per centum an-

nually upon each dollar of valuation, and the state board of assessors shall compute the same; each company shall also pay, in addition to said tax of one-half of one per centum, a tax at the local rate as fixed and assessed for county and municipal purposes upon other property in each taxing district, upon the valuation of its property in the several taxing districts, separately valued and assessed under the provisions of subdivision two of section three of this act, which tax shall also be computed by the state board of assessors; but the last-mentioned rate shall in no case exceed one per centum of the valuation of the property valued under the provisions of subdivision two of section three of this act; the sum of the estimates or computations for each company shall constitute the tax to be paid by each company and shall be a lien paramount to all other liens upon all the lands and tangible property and franchise of such company in this state; such lien shall take effect on the first day of November, and a copy of the valuation in detail of the property of each cor-
176 poration and of the tax assessed against the same under the provisions of this act shall be served upon the treasurer of such corporation or left at his office within ten days after the said first day of November, but the failure to serve any such notice shall not be held to invalidate any tax assessed or affect any lien created under this act; said tax shall be a debt due from such company to the state on that date, for which an action at law or in equity may be maintained and which shall be a preferred debt in case of insolvency; these remedies are in addition to the special proceedings provided for in this act.

10. *And be it enacted*, That the said board shall certify and report to the comptroller of the state, on or before the first day of December in each year, a statement of the assessed valuation of the property of each company in the state, and of the separate valuation of property in each taxing district, as made by them, the amount of tax payable by such company with respect to its property separately valued in each taxing district, and the aggregate assessed valuation, and the total tax levied upon each company; such statement shall be made separately for each company, and as to said property separately valued, shall be arranged by taxing districts in such manner as to be of easy reference, and shall be recorded in books in the office of the state comptroller, to be provided by him for that purpose, and shall be public records, subject to public inspection; and the amount of tax payable by each company, as shown by the said statements, shall be due and payable into the state treasury, on any day between the first day of November and the first day of February following; and the payment or collection thereof shall not be stayed by any writ or order of any court of law or equity; it
177 shall be the duty of the state treasurer to receive payment of the said taxes from the said companies; if the taxes of any company, or any portion thereof, remain unpaid on the first day of February following the levying thereof, such company shall be considered in default, and such taxes, or such unpaid portion thereof, shall thenceforth bear interest at the rate of one per centum for each month until paid, notwithstanding the prosecution of any

writ of certiorari or other remedy; *provided,* that so much of the tax as is applicable to general state uses, as hereinafter provided, may be paid in four equal installments on or before the first day of February, May and August and the fifteenth day of October in each year, and any unpaid portion or installment shall bear interest only from the date limited for the payment thereof, at one per centum for each month until paid, but this privilege of payment by installments shall not be granted unless the portion of the tax which is applicable to county and local purposes shall be paid before the first day of February following the levying thereof.

11. (Amended by General Public Laws of 1888, Chapter 259, Pages 376, 377.)

12. *And be it enacted,* That the said state board of assessors shall meet on the third Monday of November, at the state house, in Trenton, for the purpose of reviewing their assessment, and may adjourn from time to time until they shall have finished the hearing; upon the written complaint of any company or person considering itself or himself aggrieved, and specifying their grievance, or of the attorney general or of any member of the board, on behalf of the state, that the property of any company is assessed too low, either in the whole or in any taxing district, or that property has been omitted, they shall review the said assessment, and
178 correct the same as shall appear just; the attorney general shall attend such meeting of said board in person or by deputy; no complaint that any company or person is assessed too low, or that any property has been omitted, shall be acted upon until the company or person so assessed shall be notified of such complaint by five days' notice, to be served on such company or person by leaving the same at the office of such company or at the usual place of abode of such person, if a resident of this state; the board shall have the power to issue subpœnas and examine witnesses and call for the production of books and papers, and they shall be entitled to use their personal knowledge and judgment as to the value of property; they shall certify to the comptroller of the state all corrections which they shall make in any assessment; the proceedings provided for by this section shall be completed before the fifteenth day of January following the making of said assessment, and all complaints must be presented on or before the third Monday of November, or shall be deemed to have been waived.

13. *And be it enacted,* That if any company or person assessed, or if the attorney general on behalf of the state, or if the authorities of any taxing district, shall desire to contest the validity or amount of any tax levied upon property under the provisions of this act, such contest shall be made by certiorari, which may be granted on notice to the attorney-general or to the company or person assessed, on a proper case made, on such terms as the justice or court granting the writ may impose; upon such writ, relief may be had as well in cases where it is claimed that the amount of tax is excessive or insufficient, as in cases where it is claimed that the principle
179 upon which the assessment is made is erroneous; *provided,* that no writ of certiorari shall be granted unless the appli-

cant has applied to said board of assessors to review the assessment, as provided for in this act, nor shall any writ of certiorari be granted after the expiration of three months from the final determination of said board; if such writ shall be allowed, and if it shall be made to appear that any assessment is unlawful, excessive or insufficient, the court shall correct the same by whomsoever such writ shall be prosecuted, and reduce or increase it, as may be just, or refer it back to the board of assessors, who shall correct or re-assess the same, in accordance with the instructions of the court; in any suit or proceeding, except on such certiorari, the certificate and report of the state board of assessors shall be conclusive and shall have the force and effect of a jud-ment of a court of record having competent jurisdiction, and the proceedings whereon such certificate and report are founded, shall not be inquired into; no assessment or tax shall be set aside for misnomer of the owner of the property assessed; but the name may be corrected at any time by the board of assessors or court; the prosecutor of a writ of certiorari shall pay eight cents per folio to the state board of assessors and comptroller for returns made by them of proceedings under this act.

14. *And be it enacted,* That if any tax under the provisions of this act shall remain unpaid in whole or in part for ten days after the expiration of the time limited for payment thereof, it shall be the duty of the attorney general to apply forthwith to a justice of the supreme court for an order that said tax and the interest due thereon and a reasonable sum to be certified by said justice to be paid for the expense of said proceeding, shall be made a record of the supreme court, and judgment shall be entered therefor in the name of the State of New Jersey as plaintiff against said company, mortgagee or mortgagees, or other creditor, as defendant, which order shall be made upon the production of a certified copy from the comptroller of the certificate and report of the state board of assessors on file in his office, and of the certificate of the comptroller that said tax has not been paid: the attorney general shall also apply for an order that execution forthwith issue on said judgment, directed to a master of the court of chancery, to be named by said justice in said order; the said orders shall be respectively applied for on five days' notice to the company or mortgagee or mortgagees or other creditor concerned, which notice, in case of any company, shall be served in the same manner as a summons is directed by law to be served upon a corporation, and in all cases the proceedings shall be summary; in case a certiorari shall have been granted, on application of the attorney-general the orders above provided for shall be made and enforced without prejudice to the right of the state to enforce the payment of any additional amount of tax which may be imposed and to apply for a second judgment therefor; in case a certiorari shall have been granted on application of any company or mortgagees or other creditor taxed, and the tax shall have been reduced after the payment thereof, then the excess shall be repaid by the state upon the order of the court, and the state comptroller shall, upon such order, issue his warrant for such payment accordingly.

15. *And be it enacted*, That the master in chancery to whom the execution shall be directed shall sell all the franchise, real estate and rolling stock and property of said company, and the
181 estate and interest of any mortgagees, and the debt due to any creditor for which a deduction has been allowed, or so much thereof as may be necessary to make the amount due on said tax judgment and the usual execution fees; the execution shall describe the property or debt aforesaid whereon the tax was assessed, and shall direct the sale thereof, and, generally, the sale of all other property of said company or person; such sale shall pass the absolute title to the franchise and property and debt aforesaid so sold, whereon the said tax was assessed or became a lien, free and clear of all liens, incumbrances and trusts of every nature, except taxes subsequently levied; in case of the sale of the estate and interest of any mortgagee it shall pass as well such estate as the interest of all bondholders and *cestuis que trust* for whose benefit said mortgage may have been given or may be held in trust or otherwise as to any other property of said company or persons, the judgment and execution shall constitute or become liens in the same manner and to the same extent as other judgments and executions of the supreme court; the sale, advertisements and proceedings under such executions shall be the same as under other executions of the supreme court; *provided, however,* that the company whose franchise, real estate, rolling stock and property, or any part thereof, has been so sold, and the mortgagee or mortgagees or any bondholder or other person having an interest in the estate and interest of the corporation or mortgagee which has been so sold, may, at any time within two years from and after any such sale, redeem the property so sold by tendering and paying to the purchaser or purchasers thereof the amount of the purchase-money by him or them paid, together with interest thereon at the rate of ten per centum per annum.

182 16. *And be it enacted*, That in order to ascertain the facts necessary for the discharge of their duties under this act, the said board shall use such lawful means as they may deem necessary; they may employ surveyors if they shall be dissatisfied with information otherwise attainable; they shall have the power of compelling the attendance of witnesses and the production of books and papers; and they may delegate such power to any member of their board authorized by them to investigate and report; they shall also use the returns hereinafter provided for, but such returns shall not be conclusive, and if any of said returns shall not be made, the board shall ascertain the necessary facts from the best information they can obtain, in such mode as they may find convenient, using their personal knowledge and judgment; the said assessors, or any one of them, shall have power to administer oaths and affirmations to any person to ascertain any facts which will enable them properly to perform the duties of their office, and they may reduce the statements of the person sworn to writing, and require him to swear and subscribe thereto, and may *ex parte*, apply for and obtain from any justice of the supreme court an order to compel any person to submit to examination in reference to such matters, and such justice

may punish any party as for a contempt who shall disobey any order made by such justice in the premises.

17. *And be it enacted,* That on or before the first Tuesday of May in each year, any person or company running, operating or constructing any railroad or canal in this state shall return to the state board of assessors statements or schedules, subscribed and sworn to by the president or other chief officer, before some officer
183 of the state authorized to administer oaths, of the property of such railroad or canal as it existed on the first day of January preceding, which, for each railroad, shall be as follows:

I. Of the real estate, specifying its extent and dimensions, which may be shown by a map or maps, setting out in detail the total length of the road, including branch and leased lines, the entire length in this state, and the length of double or side tracks; and the number, character and value of all buildings and structures in each county and in each taxing district through or in which it is located in this state, designating the main stem or road-bed and the width wherever it exceeds one hundred feet, and designating particularly any portion in each taxing district which is not used for railroad purposes, and which is locally assessed and taxed, and the value thereof;

II. Of the rolling stock and tangible personal property, giving the number of freight engines, passenger engines, passenger and freight cars, ferry boats and other movable property of every description, owned, used or hired, and the value thereof;

III. A statement or schedule, showing:

a. The amount of capital stock authorized and the number of shares into which such capital stock is divided:

b. The amount of capital stock paid up;

c. The market value, and if no market value, then the actual value of the shares of stock;

d. The total amount and the details and particulars of all indebtedness;

Such statements and schedules for canals shall be as follows:

I. Of all the real estate of said company, giving the depth
184 of water and dimensions of such canal, the length of the canal and of its feeders in the state, and the number, character and value of all locks, and of all buildings and other structures in each county and taxing district, designating particularly the width where it exceeds one hundred feet and designating any portion in each taxing district which is not used for canal purposes and which is locally assessed and taxed;

II. The floating and movable property;

III. A statement or schedule containing all the particulars above enumerated and to be returned by railroad companies in the third statement or schedule; such statements or schedules shall be made in conformity with such instructions and forms as may be prescribed by the said board, and such further statements shall be furnished as said board shall require; the said board shall prescribe the form of the oath to the statements and schedules required by

this section, any person who shall make such oath falsely shall be guilty of perjury.

18. *And be it enacted,* That any railroad or canal company claiming exemption from taxation under this act, by reason of any alleged contract with the state, shall, together with and in addition to the return required by the last section, make a further return specifying the act or acts of the legislature by which such contract is claimed to have been created, and also specifying what portion of the property of said railroad or canal company is claimed to be exempt from taxation under this act and the particulars thereof, and the cost and value thereof; and such other particulars as the charter of said company and as the said board may require, and the particulars as to character, location and value of the
185 property, if any, admitted to be liable under this act; such return shall be in no manner conclusive as to any of the facts therein stated, but said board shall investigate and determine whether any, and if any, what portion of the property of such company is by contract beyond the power of the state to tax under this act; and shall ascertain the cost and value thereof, and shall estimate the tax to be paid by such company; the residue of said property shall be assessed, apportioned, and valued and taxed pursuant to the provisions of this act.

19. *And be it enacted,* That it shall not be lawful for any railroad or canal company having any contract with the state whereby any of their property is exempted from the taxation imposed by this act, to acquire and hold, directly or indirectly, any property in this state (except such property as such company may be entitled to acquire and hold pursuant to their said contract with this state, if such company has any charter provisions on this subject which the legislature cannot abrogate or repeal), unless such company shall, by a written instrument, executed under their common seal, approved by the attorney general and filed with the secretary of state, first agree that any and all property acquired by such company after the passage of this act shall be subject to taxation under the provisions of this act, or any amendments thereto, or any further act of the legislature, in which case such property shall be so subject.

20. *And be it enacted,* That if any person or corporation running, operating or constructing any railroad or canal shall wilfully neglect to make returns, as required by this act, such person or corporation shall forfeit as a penalty not more than ten thousand dollars, to be assessed by the jury, for each offence, to be recovered in any
186 proper form of action in the supreme court, in the name of the state, and paid into the state treasury; it shall be the duty of said board to certify any such default to the attorney-general of the state, and it shall be the duty of the attorney-general to prosecute for such penalty; any person who shall make falsely any oath required to be made under this act, and any person who shall testify falsely when called to testify under this act, shall be guilty of perjury, and on conviction thereof shall be liable to all the penalties prescribed by law therefor.

21. *And be it enacted,* That all railroad companies in this

state, which shall hereafter pay any taxes imposed by this act on any cars, hired, leased, run or used on the roads of such companies in this state, shall have a right of action against the company or persons owning such cars, for the taxes so paid, with interest thereon from date of payment, and may sue for and recover the same in any court of competent jurisdiction; but nothing in this section shall be so construed as to avoid the obligation of any contract relating to the payment of taxes heretofore entered into or made between any such company, its agents, or person owning such cars, and any such railroad company.

22. *And be it enacted,* That if any company shall be in default under this act in payment of the state tax aforesaid, any person having any interest in a mortgage or other lien on its franchises or property, may pay the state treasurer the amount of such state tax, and the interest due thereon, and receive from said treasurer a certificate of such payment, and such person shall thereupon be entitled to be repaid the amount of said tax and interest thereon at
187 the rate of twelve per centum per annum out of the first proceeds of any sale of the franchises or said property of said company, and such tax and interest thereon shall continue a lien on the franchise and property of the company for the benefit of the holder of or person interested in such mortgage or lien until paid by said company from the sale of its franchises or property; if any proceedings have been taken by the attorney-general to enforce the payment of said tax and interest thereon, then such holder of or person interested in a mortgage or lien paying such tax and interest shall pay such additional amount as a justice of the supreme court shall certify to be proper and reasonable for the expenses and services of the proceedings as far as they have progressed for the collection of said tax and interest thereon.

23. *And be it enacted,* That if any railroad or canal shall be owned or operated under a franchise by any individual or association not incorporated, the term 'company' used in this act shall apply to such owners or operators, and such property shall be assessed and taxed under the provisions of this act in the same manner as if operated by a company, and the persons operating or owning such railroad or canal shall make the returns required by this act to be made by companies.

24. *And be it enacted,* That the Attorney-General shall, with the approval of the governor and comptroller, have power to employ such assistant attorneys or counsel as may be necessary to protect and properly defend the interest of the state, in carrying out the provisions of this act; and such assistants shall be paid such compensation by the state as may be approved by the attorney-general and the comptroller; the state board of assessors shall have the
188 power to employ such assistants in making their valuations as may be necessary to complete the same in due time, and such assistants shall be paid such reasonable compensation for their services as the board and the governor shall approve.

25. *And be it enacted,* That any corporation having or claiming to have any contract with the state whereby any of its property is

claimed to be exempted from the taxation imposed by this act, may, at its discretion, voluntarily pay to the state from year to year such sums of money as, added to the tax now assessable against such corporation under such alleged contract, will be equall to the tax assessable against such corporation under this act in respect to the property so claimed to be exempted, and such voluntary payment shall not be construed in any proceeding or suit to be a waiver by such corporation of its said alleged contract; *provided, however,* that nothing in this section, or in this act contained shall be construed or taken as an admission on the part of the state that any corporation is possessed of any contract or especial provision of the law on the subject of taxation which may not at any time be repealed or modified by the state.

26. *And be it enacted,* That if any section of this act shall, for any reason, be held to be unconstitutional or invalid, it shall not affect the other provisions of this act or any of them.

27. *And be it enacted,* That any corporation in this state having the right, by contract, to any different imposition of tax, either state or municipal, than that provided for in this act, are hereby authorized to execute and file in the office of the secretary of state an instrument, to be first approved by the attorney general, waiving the benefit of any such contract, whereupon they shall be
189 bound by the terms of this act, or any amendments hereto, or any further act of the legislature, and upon filing any such instrument the state agrees to surrender its right to take the property of any such corporation under any law now existing; *provided,* that any such corporation shall execute and file such instrument within six months from the time of the passage of this act.

28. *And be it enacted,* That in case any property of any railroad or canal company which has been or shall hereafter be in any year assessed by the local authorities of any taxing district has been or shall be also assessed by the state board of assessors as property used for railroad or canal purposes, the supreme court or any three justices thereof, to be assigned by the chief justice, shall determine, in a summary manner, the character of the property and whether used for railroad or canal purposes, and by which assessors the same has lawfully been assessed, which determination shall be made whether the taxes in question have been paid or not, and whether a certiorari to review either assessment has been granted or not; such determination shall be made under an order to show cause at a time and place to be therein designated, which order shall be granted by the chief justice of the supreme court upon application *ex parte* by any of the parties interested, namely, by the attorney general on behalf of the state, or by the owner of the property assessed, or by the authorities of the taxing district; and said order shall be served not less than ten days before the day fixed therein for the hearing, upon the said parties interested not making such application; depositions may be taken, on two days' notice by either party, to be used on such hearing; the justices before whom the matter shall be heard, may, if they see fit, view
190 the property in dispute, to guide them in their decision; the judgment of the court shall direct the cancellation or reduc-

tion of either assessment, as the character of the property may require, and shall make such order as to the return to the taxpayer of any tax or any portion thereof, that may have been paid to the state, or to any taxing district not entitled thereto, as such court shall deem just; the payment of costs may be directed in such manner as the court may deem equitable; the said judgment shall be conclusive and final in all collateral proceedings, but may be reviewed on writ of error by the court of errors and appeals.

29. *And be it enacted,* That if any corporation whose property and franchises have been or shall be valued and assessed under the provisions of the act to which this is a supplement, by the state board of assessors, shall pay or cause to be paid to the treasurer of the state the tax so assessed upon its property and its franchises at the times and in the same manner provided by law, or within fifteen days after the state board of assessors shall have made and declared their final revision of their valuations and assessments, that neither such payment nor the lapse of time in making application for a writ of certiorari shall be considered by any court or judge thereof as a reason why such corporation should not be entitled to such writ of certiorari upon any question adjudicated in favor of any corporation that may refuse to pay the taxes assessed against it, and that shall bring its writ of certiorari, to review the valuations and assessments within the time limited by the act to which this is a supplement; *provided,* application for writ of certiorari be made within six months after such question has been finally adjudicated,
191 and no other questions shall be considered on said writ.

30. *And be it enacted,* That this act shall be subject to amendments, alterations or repeal at the will of the legislature; the 'Act for the taxation of railroad and canal property,' approved April tenth, anno Domini eighteen hundred and eighty-four, which is by this act revised and amended, and the supplements thereto, approved February fifth and April fifth, anno Domini eighteen hundred and eighty-five, and all other acts inconsistent with the provisions of this act, are hereby repealed, except so far as herein re-enacted, but nothing in this repealer shall affect or impair the lien of any taxes heretofore assessed or any remedies for the collection of the same, or to surrender any remedies, powers, rights or privileges acquired by the state under said act hereby revised, or to relieve any person or corporation from any penalty imposed by said act and supplements, nor shall anything in this act be held to repeal the supplement to the said act hereby revised, which supplement was approved June tenth anno Domini eighteen hundred and eighty-six, nor shall this act affect the tenure of office of the present state board of assessors.

31. *And be it enacted,* That this act shall take effect immediately."

Approved March 27, 1888.

192 "EXHIBIT D" FOR IDENTIFICATION (Cont'd).

LAWS OF NEW JERSEY FOR THE TAXATION OF RAILROAD AND CANAL PROPERTY.

GENERAL PUBLIC LAWS OF 1888, PAGES 376, 377. CHAPTER CCLIX.

An Act to amend an act entitled "An act to revise and amend 'An act for the (taxation) of railroad and canal property,' approved April tenth, one thousand eight hundred and eighty-four," which was approved March twenty-seventh, one thousand eight hundred and eighty-eight.

1. *Be it Enacted by the Senate and General Assembly of the State of New Jersey,* That the eleventh section of an act to revise and amend an act entitled 'An act for the taxation of railroad and canal property,' approved April tenth, one thousand eight hundred and eighty-four, be and the same is hereby amended so as to read as follows:

2. *And be it enacted,* That the money collected under this act for the one-half of one per centum tax shall be applied to the uses of the State, according to law; the amount received for tax upon property separately assessed in the different taxing districts is hereby appropriated, and shall be allotted to the various taxing districts, giving to each district the amounts that was derived from the property of each railroad or canal company therein; the comptroller shall transmit to the collector of each county a certificate showing the amount allotted to the taxing districts therein, and shall draw his warrant upon the state treasury, in favor of the several county collectors, for the amounts allotted to their several counties, and the county collector shall forthwith pay to the collector, or other proper

193 officer of each taxing district, the amount allotted thereto, deducting, however, the amount due for county taxes from such taxing district; the amount thus paid to the county and taxing district shall be at the disposal of the proper authorities for public purposes; *provided, however,* that whenever the local city rate as fixed and assessed in any city exceeds one per centum of the ratables of such city, then in such case the comptroller shall transmit to the collector of taxes of said city a certificate showing the amount allotted to such city, and shall draw his warrant upon the state treasury in favor of the treasurer of such city for said amount; such warrant to be at the disposal of the board of such city having control of its finances, to be used for the municipal purposes of such city, such amount to be first applied to the purchase of such outstanding bonds or obligations of the city as can be bought below the par value thereof, and if no bonds or obligations can be bought below par, then such amount, or the balance, if any, shall be applied to the payment of such part of the city debt and interest falling due thereon as the said board having control of the finances of the city may determine.

2. *And be it enacted,* That this act shall take effect immediately.

Approved April 2, 1888.

194 "EXHIBIT D" FOR IDENTIFICATION (Cont'd).

LAWS OF NEW JERSEY FOR THE TAXATION OF RAILROAD AND CANAL PROPERTY.

GENERAL PUBLIC LAWS OF 1891, PAGES 165, 166. CHAPTER XCVIII.

A supplement to an act entitled "An act to revise and amend 'An act for the taxation of railroad and canal property,' approved April tenth, one thousand eight hundred and eighty-four," approved March twenty-seventh, one thousand eight hundred and eighty-eight.

1. *Be it enacted by the Senate and General Assembly of the State of New Jersey*, That section two of the act to which this is a supplement, be amended to read as follows:

2. *And be it enacted*, That all property of any railroad and of any canal company used for railroad or canal purposes shall be assessed by a state board of assessors, which shall consist of four members, and shall be appointed by the governor, by and with the advice and consent of the senate; no person shall be qualified or authorized to act as a member of said board unless his appointment shall have been confirmed by the senate; their term of office shall commence on the first Monday of May; the assessors first appointed shall be appointed to hold office respectively for one, two, three and four years, and until the appointment of a successor; all subsequent appointments shall be for a term of four years and until the appointment of a successor; vacancies shall be filled by the governor, subject to the approval of the senate; the said assessors shall be citizens of this state, and shall not, during their term of office, be interested in any
195 railroad or canal company; each assessor shall, before entering upon his duties, file with the secretary of state an oath taken before a justice of the supreme court that he will faithfully discharge the duties of his office, and that he is not interested in any railroad or canal company; they shall each receive an annual salary of twenty-five hundred dollars; three members shall constitute a quorum, and any official act shall be valid which has the sanction of three members; they may employ a secretary, who shall receive an annual compensation as the board of assessors may determine, not to exceed twenty-five hundred dollars; they shall keep a record of their proceedings and shall annually report to the legislature.

2. *And be it enacted*, That this act shall take effect immediately.

Approved March 17, 1891.

196 EXHIBIT "E" FOR IDENTIFICATION.

LAWS OF THE COMMONWEALTH OF PENNSYLVANIA, SESSION OF 1889.

(p. 420.) No. 332.

A further supplement to an act entitled "An act to provide revenue by taxation," approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine.

* * * * * * *

(p. 427.) SECTION 19. That hereafter no limited partnership, bank, joint-stock association, association, corporation or company whatsoever, formed, erected, incorporated or organized by or under any law of this commonwealth, general or special, or formed, erected, incorporated or organized under the laws of any other state, and doing business in this commonwealth, shall go into operation, without first having the name of the institution or company, the date of incorporation or organization, the act of assembly or authority under which formed, incorporated or organized, the place of business, the post office address, the names of the president, chairman, secretary and treasurer or cashier, and the amount of capital authorized by its charter, and the amount of capital paid into the treasury, registered in the office of the auditor general; and every limited partnership, bank, association, joint-stock association, company or corporation whatsoever, now engaged in business in this comonwealth, shall within ninety days after the passage of this act, register as herein required in the office of the auditor general; all the corporations, companies, associations and limited partnerships
197 aforesaid, shall annually hereafter notify the auditor general of any change in their officers; and any such institution or company which shall neglect or refuse to comply with the provisions of this section, shall be subject to a penalty of five hundred dollars, which penalty shall be collected on an account settled by the auditor general and state treasurer in the same manner as taxes on capital stock are settled and collected.

SESSION OF 1891.

(p. 229.) No. 200.

An act to provide increased revenues for the purpose of relieving the burdens of local taxation, being supplementary to an act entitled "An Act to provide revenue by taxation," approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine, amending the first, fourteenth, sixteenth, twentieth, twenty-first, twenty-fifth and twenty-sixth sections of an act supplementary thereto, which became a law on the first day of June, Anno Domini one thousand eight hundred and eighty-nine, entitled "A further supplement to an act entitled 'An act to provide revenue by taxation,' approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine," and providing for greater uniformity of taxation by taxing all of the property of corporations, limited partnerships and joint-stock associations having capital stock, at the rate of five mills on each dollar of its actual value.

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(p. 233.) SECTION 4. That section twenty of said act which reads as follows, to-wit,

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(p. 235.) be and the same is hereby amended so as to read as follows:

SECTION 20. That hereafter, except in the case of banks,
198 savings institutions and foreign insurance companies, it shall be the duty of the president, chairman or treasurer of every corporation, having capital stock, every joint-stock association and limited partnership whatsoever, now or hereafter organized or incorporated by or under any law of this Commonwealth, and of every corporation, joint-stock association and limited partnership whatsoever, now or hereafter incorporated or organized by or under the laws of any other state or territory of the United States, or by the United States or by any foreign government, and doing business in and liable to taxation within this Commonwealth, or having capital or property employed or used in this Commonwealth by or in the name of any limited partnership, joint-stock association, company or corporation whatsoever, association or associations, co-partnership or co-partnerships, person or persons, or in any other manner, to make a report in writing to the Auditor General, in the month of November, one thousand eight hundred and ninety-two, and annually thereafter, stating specifically:

First. Total authorized capital stock.
Second. Total authorized number of shares.
Third. Number of shares of stock issued.
Fourth. Par value of each share.
Fifth. Amount paid into the treasury on each share.
Sixth. Amount of capital paid in.
Seventh. Amount of capital on which dividend was declared.

Eighth. Date of each dividend declared during said year ended with the first Monday of November.

Ninth. Rate per centum of each dividend declared.

Tenth. Amount of each dividend during the year ended with the first Monday in said month.

Eleventh. Gross earnings during the year.

Twelfth. Net earnings during said year.

Thirteenth. Amount of surplus.

Fourteenth. Amount of profit added to sinking fund during said year.

Fifteenth. Highest price of sales of stock between the first and fifteenth days of November aforesaid.

Sixteenth. Highest price of sales of stock during the year aforesaid.

Seventeenth. Average price of sales of stock during the year; and in every case any two of the following officers of such corporation, limited partnership or joint-stock association, namely: The president, chairman, secretary and treasurer, after being duly sworn or affirmed to do and perform the same with fidelity and according to the best of their knowledge and belief, shall, between the first and fifteenth days of November of each year, estimate and appraise the capital stock of the said company at its actual value in cash, not less, however, than the average price which said stock sold for during said year, and not less than the price or value indicated, or measured by net earnings or by the amount of profit made and either declared in dividends, or carried into surplus or sinking fund, and when the same shall have been so truly estimated and appraised they shall forthwith forward to the Auditor General a certificate thereof, accompanied with a copy of their said oath or affirmation, signed by them and attested by a magistrate or other person duly qualified to administer the same: *Provided*, That if the Auditor General and State Treasurer, or either of them, is not satisfied with the appraisement and valuation so made and returned, they are hereby authorized and empowered to make a valuation thereof, based upon the facts contained in the report herein required, or upon any information within their possession, or that shall come into their possession, and to settle an account on the valuation so made by them for the taxes, penalties and interest due the Commonwealth thereon, with right to the company dissatisfied with any settlement so made against it to appeal therefrom in the manner now provided by law; and in the event of the neglect or refusal of the officers of any corporation, company, joint-stock association or limited partnership, for a period of sixty days, to make the report and appraisement to the Auditor General as herein provided, it shall be the duty of the Auditor General and State Treasurer to estimate a valuation of the capital stock of such defaulting corporation, company, joint-stock association or limited partnership, and settle an account for taxes, penalty and interest thereon, from which settlement there shall be no right of appeal."

"EXHIBIT E" FOR IDENTIFICATION (Cont'd).

SESSION OF 1893.

(p. 353.) No. 288.

An act being a further supplement to an act entitled "An act to provide revenue by taxation," approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine, amending the amendment of the supplement thereto, which became a law on the first day of June, Anno Domini one
201 thousand eight hundred and eighty-nine, which amendment herein amended was approved the eighth day of June, Anno Domini one thousand eight hundred and ninety-one, relating to the tax on capital stock.

SECTION 1. Be it enacted, &c., that the twenty-first section of an act which became a law on the first day of June, Anno Domini one thousand eight hundred and eighty-nine, entitled "A further supplement to an act entitled 'An act to provide revenue by taxation,' approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine, as the said section is amended by an act approved the eight- day of June, Anno Domini one thousand eight hundred and ninety-one," which reads as follows, to-wit:

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be and the same is hereby amended so as to read as follows:

SECTION 21. That every corporation, joint-stock association, limited partnership and company whatsoever, from which a report is required under the twentieth section hereof, shall be subject to and pay into the treasury of the Commonwealth, annually, a tax at the rate of five mills upon each dollar of the actual value of its whole capital stock of all kinds, including common, special and preferred, as ascertained in the manner prescribed in the said twentieth section, and it shall be the duty of the treasurer or other officers having charge of any such corporation, joint-stock association or limited partnership, upon which a tax is imposed by this section, to transmit the amount of said tax to the treasury of the Commonwealth within thirty days from the date of settlement of the account by the Auditor General and State Treasurer; *Provided*, That for the purposes of this act, interests in limited partnerships or joint-
202 stock associations shall be deemed to be capital stock and taxable accordingly; *Provided, also,* That corporations, limited partnerships and joint-stock associations, liable to tax on capital stock under this section, shall not be required to make and report or pay any further tax on the mortgages, bonds and other securities owned by them in their own right; but corporations, limited partnerships and joint-stock associations holding such securities as trustees, executors, administrators, guardians, or in any other manner, shall return and pay the tax imposed by this act upon all securities so held by them as in the case of individuals: *And provided further,*

That the provisions of this section shall not apply to the taxation of so much of the capital stock of corporations, limited partnerships or joint-stock associations, organized for manufacturing purposes, which is invested in and actually and exclusively employed in carrying on manufacturing within the State, except companies engaged in the brewing or distilling of spirits or malt liquors and such as enjoy and exercise the right of eminent domain; but every manufacturing corporation, limited partnership or joint-stock association shall pay the State tax of five mills herein provided, upon such proportion of its capital stock, if any, as may be invested in any property or business not strictly incident or appurtenant to its manufacturing business, in addition to the local taxes assessed upon its property in the districts where located, it being the object of this proviso to relieve from State taxation only so much of the capital stock as is invested purely in the manufacturing plant and business: *Provided further,* In case of fire or marine insurance companies the tax imposed by this section shall be at the rate of three mills on each dollar of the actual value of the whole capital stock.

Approved June 8, 1893.

203 "EXHIBIT E" FOR IDENTIFICATION (Cont'd).

SESSION OF 1889.

No. 332.

(p. 431.) "SECTION 23. That every railroad company, pipe line company, conduit company, steamboat company, canal company, slack water navigation company, transportation company, street passenger railway company, and every other company, joint-stock association or limited partnership, now or hereafter incorporated or organized by or under any law of this Commonwealth, or now or hereafter organized or incorporated by any other State or by the United States or any foreign government, and doing business in this Commonwealth, and owning, operating or leasing to or from another corporation, company, association, joint stock association or limited partnership, any railroad, pipe line, slack water navigation, street passenger railway, canal or other device for the transportation of freight or passengers or oil, and every telephone or telegraph company incorporated under the laws of this or any other State or of the United States and doing business in this Commonwealth, and every express company, incorporated or unincorporated, doing business in this Commonwealth, and every firm, co-partnership or joint-stock company or association doing express business in this Commonwealth, and every electric light company, and every palace car and sleeping car company, incorporated or unincorporated, doing business in this Commonwealth, shall pay to the state treasurer a tax of eight mills upon the dollar upon the gross receipts of said corporation, company or association, limited partnership, firm or co-partnership, received from passengers and freight traffic transported wholly within this

State, and from telegraph, telephone or express business
204 done wholly within this State, or from business of electric light companies, and from the transportation of oil done wholly within the State; the said tax shall be paid semi-annually upon the last days of January and July in each year; and for the purpose of ascertaining the amount of the same, it shall be the duty of the treasurer or other proper officer of the said company, firm, co-partnership, limited partnership, joint-stock association or corporation, to transmit to the auditor general a statement, under oath or affirmation, of the amount of gross receipts of the said companies, co-partnerships, corporations, joint-stock associations or limited partnerships derived from all sources, and of gross receipts from business done wholly within the State, during the preceding six months ending on the first days of January and July in each year; and if any such company, firm, co-partnership, joint-stock association, association or limited partnership or corporation, shall neglect or refuse for a period of thirty days after such tax becomes due, to make said returns or to pay the same, the amount thereof with an addition of ten per centum thereto, shall be collected for the use of the Commonwealth as other taxes are recoverable by law; *Provided,* That in any case where the works of one corporation, company, joint-stock association or limited partnership are leased to and operated by another corporation, company, association or limited partnership, the taxes imposed by this section shall be apportioned between the said corporations, companies, associations or limited partnerships, in accordance with the terms of their respective leases or agreements, but for the payment of the said taxes, the Commonwealth shall first look to the corporation, company, association or limited part-
205 nership operating the works, and upon payment by the said company, corporation, association or limited partnership of a tax upon the receipts as herein provided derived from the operation thereof, the corporation, company, joint-stock association or limited partnership from which the said works are leased, shall not be held liable under this section for any tax upon the proportion of said receipts received by it as rental from the use of said works.

SESSION OF 1889.

No. 332.

(p. 437.) SECTION 31. That all taxes imposed by this act shall be a lien upon the franchises and property, both real and personal, of corporations, companies, associations, joint-stock associations and limited partnerships, from the time the said taxes are due and payable; and whenever the franchises or property of a corporation, company, association, joint-stock association or limited partnership shall be sold at a judicial sale, all taxes due the Commonwealth shall first be allowed and paid out of the proceeds of such sale, before any judgment, mortgage or other claims which shall be entered of record or become a lien after the passage of this act.

206 "EXHIBIT F" FOR IDENTIFICATION.

PENNSYLVANIA COUNTY COURT REPORTS, VOLUME 14, PAGE 440.

COMMONWEALTH
vs.
DELAWARE, SUSQUEHANNA & SCHUYLKILL RAILROAD COMPANY.

Corporations—taxation of capital stock—minimum value—actual value—tangible property and assets—franchises and privileges—material results realized therefrom—section 4, revenue act of 1891, P. L., 229—preamble of act of 1891.

The intent and meaning of Sec. 4 of the revenue act of 1891 is that only so much of the income of a corporation—using this word as an equivalent for both net earnings and amount of profit made—as is "made and either declared in dividends or carried into surplus or sinking fund" is to be taken as the test of minimum value in appraising the capital stock of a corporation: Commonwealth *vs.* Sharon Coal Co., 14 Pa. C. C. R., 222.

The amount and rate per cent. of dividends made and the amount carried into surplus or sinking fund during the tax year do not furnish an absolute indication or measure of the actual value in cash of the capital stock, but are to be considered with all other relevant facts in determining what is its actual value in cash: Commonwealth *vs.* Sharon Coal Co., 14 Pa. C. C. R., 222; Commonwealth *vs.* Edgerton Coal Co., 14 Pa. C. C. R.

The tax on capital stock imposed by the taxing acts of Pennsylvania is not a franchise or license tax, but is a tax on the property and assets of a corporation: Commonwealth *vs.* Standard Oil Co., 101 Pa., 119.

207 The capital stock represents not only the property and assets of a corporation, but also the value of its franchises and privileges and facilities for doing business and the success with which the business is actually carried on, so far as these are denoted and expressed by the pecuniary results realized; these elements of value are intended to be reached by the tax on capital stock by the express terms of the act of 1891.

Tax on capital stock.

C. P. Dauphin Co. March Term, 1893. No. 302.

Hensel, Attorney-General for the Commonwealth, and Lamberton, for the defendant.

SIMONTON, *P. J.:*

This is an appeal by the corporation defendant from the settlement of an account against it by the auditor general and state treasurer of tax on capital stock for the year ending first Monday of November, 1892, and it was tried by the court without a jury under the act of April 22, 1874.

Findings of Fact.

1. Defendant is and was during the year 1892 a corporation of and doing business in the State of Pennsylvania chartered in April, 1890, with an authorized capital stock of $1,000,000, of which $400,000 was paid in prior to June, 1892, and the balance at that time. Its railroad is located in the anthracite coal region of eastern Pennsylvania, and including branches is about 60 miles in length. It runs in a devious course, and thus and by means of branches from the main line reaches a number of collieries, nearly all of which are owned and controlled by the firm of Coxe Brothers & Co., who also own nearly all the shares of stock in the railroad company;
208 it was built for the purpose of connecting these collieries with the various railroads that traverse that region, and does not connect with the Pennsylvania, the Reading, the Lehigh Valley and the Jersey Central railroads; thus giving the owners of these collieries and of this railroad not merely access to the various markets for coal, east, north and west, but also a choice of roads over which to reach these markets and with which to make traffic contracts. Nearly all of the freight carried by the defendant is coal, and should this traffic fail or be withdrawn its capital stock would be comparatively valueless; but there is no evidence in the case tending to show that there is any present prospect that this will occur; and in view of the fact that these railroads and these collieries are owned by the same persons, it does not seem probable, so long as the coal mines are not exhausted; nor is there any evidence that this will take place for many years to come.

2. The gross earnings of the defendant during the year 1892 were $739,914.15 and its net earnings were $523,243.15, and it made one dividend during the year, on October 15th, 1892, of 40%, amounting to $400,000, out of net earnings realized to June 30, 1892; its net earnings from June 30, 1892, to February 28, 1893, were about $450,000, and the amount of its surplus on the first Monday in November, 1892, was $242,142.89, in addition to book accounts amounting to about $100,000 in excess of its current indebtedness; and there is no evidence in the case tending to show that its net earnings will be less in the future, except in so far as they may be affected by the general financial depression. The total cost of defendant's railroad, which was completed in February, 1893, including equipment, was $1,159,323.70.

3. Defendant's president and treasurer made to the auditor
209 general, under the sanction of the prescribed oath, the report and appraisement required by sec. 4 of the act of 1891 (P. L. 229), appraising defendant's capital stock of $2,000,000, which is double its par value. There were no sales of shares of the stock during the tax year.

4. The auditor general and the state treasurer were not satisfied with and did not accept this appraisement; but, as they understood to be their duty under the law, made an appraisement and fixed the value of said capital stock at $8,720,719.16. In making this ap-

praisement they had before them no other evidence of its actual value than that contained in the report made by the officers of the corporation as above stated; and this amount was adopted by them as the value of the capital stock because it was the sum which at six per cent. would produce $523,234.15, the amount of net earnings made by the defendant as shown by said report. On this valuation so made by the auditor general and state treasurer an account was settled against defendant for tax at the rate of 5 mills, amounting to $43,603.59, from which settlement defendant duly appealed to this court.

5. We find from the evidence that the actual value of the defendant's capital stock between the first and 15th days of November, 1892, was not $8,720,719.16, the amount at which it was appraised by the auditor general and state treasurer; but having in view from the evidence, considering all the facts which are in our judgment relevant on the principles more fully explained below, we find that the actual value in cash of the defendant's capital stock at the date mentioned was $4,000,000.

We have decided in opinions recently filed in Com. *v.* Sharon Coal Co., 23, June Term, 1893 (14 Pa. C. C. R., 222), in Com. *v.*
210 Edgerton Coal Co., 21, June Term, 1893, that the intent and meaning of sec. 4 of the revenue act of 1891, P. L. 229, is that only so much of the income of a corporation—using this word as an equivalent for both net earnings and amount of profit made—as is "made and either declared in dividends or carried into surplus or sinking fund" is to be taken as the test of minimum value in appraising the capital stock of a corporation; and that the amount and rate per cent. of the dividends made and the amount carried into surplus or sinking fund during the tax year do not furnish an absolute indication or measure of the actual value in cash of the capital stock, but are to be considered with all other relevant facts in determining what is its actual value in cash.

These decisions settle for us the law of this case on the points thus described and lead to the result that the appraisement made by the auditor general and state treasurer and the settlement based thereon cannot be sustained merely as a conclusion of law, but must stand or fall on the actual facts of the case; in other words, the question we have to decide on this appeal is what is the actual value in cash of the defendant's capital stock.

It has been settled by numerous decisions which are cited and affirmed in Com. *vs.* Standard Oil Co., 101 Pa., 119, that the tax on capital stock imposed by the taxing acts of this state is not a franchise or license tax, but is a tax on the property and assets of a corporation. But it by no means follows that the capital stock and the tangible property and assets are identical either in substance or in value. The capital stock, it is true, represents the property and assets of the corporation, but it represents also the value of its franchises and privileges and facilities for doing business and the success with which the business is actually carried on, so far as these are
211 denoted and expressed by the pecuniary results realized; and the tax on capital stock is by the express terms of the act of 1891 intended to reach these elements of value. See preamble 6 P. L., 1891, p. 229.

The case of Com. *v.* Hamilton Manufacturing Co., 12 Allen, 298, contains an admirable discussion and exposition by Bigelow, *C. J.*, of the difference which may exist between the value of the tangible property and the assets of a corporation and the value of its capital stock, which is so apt for our purpose that we make copious extracts therefrom, with the remark that the whole opinion ought to be read in its connection. Assuming that the value of the capital stock of a corporation is equal to the value of all its shares—the theory of the act of 1891, which makes the market price of the shares a test of the actual value of the capital stock—he says: "The aggregate market value of all shares, by which we understand the cash price for which the shares will sell in the market, does not necessarily indicate the actual value or amount of property which a corporation may own. The price for which all the shares would sell may greatly exceed the aggregate of the corporate property or it may fall very short of it. Undoubtedly the amount of property belonging to a corporation is one of the considerations which enters into the market value of its shares; but such market value also embraces other essential elements. It is not made up solely by the valuation or estimate which may be put on the corporate property, but it also includes the profits and gains which have attended its operations, the prospects of its future success, the nature and extent of its corporate rights and privileges and the skill and ability with which its business is managed. In other words, it is the estimate put on the potentiality of a cor-
212 poration, on the capacity to avail itself profitably of its franchise, and on the modes in which it uses its privileges as a corporate body, which materially influences and often controls the market value." "There may be two corporations organized with similar powers, having the same number of shares, the same amount of property, of capital, and both may be engaged in the same branch of business; the market value of the shares in one corporation may be double that of the other, because one is prosperous and likely to make large gains, while the other is unsuccessful and is carrying on a business which may prove unprofitable or lead to heavy loss. The tax is therefore laid not on capital stock as signifying the money paid in to carry on the business of the corporation or the property purchased and owned by the corporation, but on the capital stock representing the aggregate of the market value of the shares. The price for which these shares may be sold does not depend upon the value or amount of property belonging to a corporation, but rather on the capacity of a corporation to use its property in connection with its corporate powers and privileges advantageously and profitably and upon the present prosperity, prospective earnings and profitable final results of the corporate business." "Nor are we able to see any reason why the aggregate market value of all the shares of a corporation, representing as it does the estimate put not merely on the property of a corporation but also on the rights, privileges, capacities and present and prospective results of the corporate organization and business—in other words, on its franchise—is not a legitimate and just method of arriving at a basis on which to calculate an excise or tax."

These extracts, and still more the whole opinion from which they are taken, abundantly show that the actual value in cash of
213 defendant's capital stock is not to be determined solely by ascertaining the value of its tangible property and assets, but that many other elements of value are to be considered. Chief Justice Bigelow's discussion, it is true, leads him to the conclusion that the tax he is considering is a franchise tax, and not a tax on tangible property; but this view of the case was considered in the Supreme Court of the United States in Hamilton Co. *v.* Massachusetts, 6 Wall. 632, was accepted only because it was thought to be required by the peculiar provision of the constitution of the state of Massachusetts, and the construction which had long been put upon it by the Supreme Court of that State, which as a question of the construction of a state statute was binding on the federal court. Thus Mr. Justice Clifford, delivering the opinion and referring to the decision that the tax in question was a franchise tax, at page 639 said: "Separate from the peculiar provision of the state constitution and the long practice under the original decision" (in Portland Bank *v.* Apthorp, 12 Mass. 252) "the present decision of the state court upon the subject might well be criticised as founded in unsubstantial distinctions, but when weighed as an exposition of that peculiar clause" (of the state constitution) "and in view of the long practice of the state, commencing long before the prior decision was made, it is not possible to withhold from the conclusion a full and unqualified concurrence * * * fifty years have elapsed since that decision was made and the practice in substance and effect is still continued, having been repeatedly sanctioned by the unanimous decisions of the highest judicial authority of the state."

The Chief Justice and Justices Greer and Miller refused to be bound by the construction put upon the statute by the state court and dissented on the ground that the tax in question was a
214 tax on the property of the corporation and not a franchise tax.

On the subject of taxing corporate franchises as property Justice Clifford said: "Corporate franchises * * * are legal estates and not mere naked powers granted to the corporations, but powers coupled with an interest which rest in the corporation by virtue of their charter, and * * * the privileges and franchises of a private corporation unless exempt in terms which amount to a contract, are as much the legitimate subjects of taxation as any other property of the citizens within the sovereign power of the state."

And in Wilmington Railroad *v.* Reid, 13 Wall. 264, Mr. Justice Davis, delivering the opinion of the court, said: "It is insisted, however, that the tax on the franchise is something entirely distinct from the property of the corporation, and that the legislature was not therefore inhibited from taxing it. Nothing is better settled than that the franchise of a private corporation * * * which in its application to a railroad is the privilege of running it and taking fares and freight * * * is property, and of the most valuable kind, as it cannot be taken for public use even without compensation. It is true it is not the same sort of property as the rolling stock, roadbed

and depot grounds, but it is equally with them covered by the general term 'the property of the company.'"

There is therefore no legal principle in the way of holding that the tax on capital stock in this state is a tax on property and at the same time including in the appraisement the value of the franchises and privileges enjoyed and exercised by the corporation, and determining the value of these by the material result of their exercise.

Acting on the principle suggested by the foregoing dis-
215 cussion the members of this court, both of whom sat at the trial, concur in the findings of fact above set forth, and in the conclusion that the defendant's capital stock was between the first and fifteenth days of November, 1892, of the actual value in cash of $4,000,000; and the commonwealth is therefore entitled to judgment as follows:

Value of the capital stock.....		$4,000,000 00
Tax, 5 mills.....	$20,000 00	
Interest from April 1, 1893, to January 1, 1894, at 12% per annum.....	1,800 00	
Attorney-General's commission, 5%....	1,000 00	
Total	$22,800 00	

for which amount judgment is directed to be entered in favor of the commonwealth and against the defendant, if exceptions be not filed within the time limited by law.

107 Pennsylvania State, 156.

Pullman's Palace Car Co. *v.* Commonwealth, No. 2.

1. Under the acts of assembly of Pennsylvania imposing state tax on capital stock of corporations doing business in this state, Pullman's Palace Car Company, a foreign corporation, is liable to taxation on the proportion of its capital stock invested in Pennsylvania as represented by the cars used by it in the state, whether such cars be owned or leased by said company. The fact that said cars are continuously run into, through and out of this state and are also operated in other states does not exempt the company from taxation here; it but reduces the valuation upon which the company is taxable.

216 2. Such construction of said acts of assembly does not render the same obnoxious to the provision of the federal constitution regulating interstate commerce.

June 6, 1884. Before Mercur, *C. J.*, and Gordon, Paxson, Turnkey, Sterrett, Green and Clark, *JJ.*

Error to the Court of Common Pleas of Dauphin County of May term, 1883. No. 35.

This case was in the court below and appealed by Pullman's Palace Car Company from a settlement of account by the auditor general

and state treasurer charging the said corporation with a tax on its capital stock for the years 1870 to 1880 inclusive, under the provisions of the acts of May 1, 1868, April 24, 1874, section 4, March 20, 1877, and June 7, 1879. The account was based upon the estimated rate of dividends in each year and upon the estimated proportion of capital stock taxable for Pennsylvania, and included interest and penalties for failure to report.

The defendant filed specifications of objection and the case was tried by agreement under the act of April 22, 1874, without a jury, before Simonton, *P. J.*, whose findings of fact and conclusions of law were as follows:

The defendant is a corporation of the state of Illinois, having its principal office in Chicago. Its business was during all the time for which tax is charged, to furnish sleeping coaches and parlor and dining-room cars to various railroad companies with which it contracted, on the following terms: The defendant furnished the coaches and cars, and the railroad companies attached and made them part of their trains, no charge being made by either party against the other. The railroad companies collected the usual fare from passengers who travelled in their coaches and cars, and
217 the defendant collected a separate charge for the use of the seats, sleeping berths and other conveniences. Business has been carried on continuously by the defendant in this way in Pennsylvania since February 17, 1870, and it has had about 100 coaches and cars engaged in this way in this state during that time.

About the time defendant began operations in this state, a corporation thereof called the Central Transportation Company was engaged in a like business here and had contracts with many of the railroad companies in the state to run parlor and sleeping cars on the terms stated above.

Defendant found it for its interest to purchase said contracts from said company and lease its cars for a period of 99 years, at an annual rental, covenanting to keep the cars in repair and return them or others in their place in as good order as when received at the end of that period. These cars, or most of them, as well as some of the other cars belonging to the defendant, have ever since been running in, into, through and out of the state.

The following additional facts were found by the Court:

1. That defendant transacted no business in Pennsylvania except upon the roads and in the cars covered by its lease with the Central Transportation Company.

2. That defendant leased 119 cars from the Central Transportation Company, and that said cars were more than sufficient for the transportation of all the business done by it within the State of Pennsylvania, no more than 100 cars being used in said State in any year.

3. That the cars used in the state of Pennsylvania were
218 also used in other states; their use in Pennsylvania being confined to passengers to or from points in other states.

4. That the rental paid to the Central Transportation Company for the use of its cars exceeded the gross receipts of the defendant from all its business within the state of Pennsylvania.

5. That the Central Transportation Company is a corporation of the state of Pennsylvania, and has paid to the state the full tax upon its entire capital stock for each of the years embraced in this suit.

On the facts defendant claims that no part of its capital stock is invested in this state. The argument is that its cars are personal property, and as they are not permanently located in this state, but pass into, through and out of it, this personal property has no taxable *situs* in Pennsylvania, and cannot be taxed specifically in any given locality, and therefore it is contended as the tax on capital stock is a tax on the property in which that capital is invested, the latter cannot be taxed.

It has certainly been settled by Commonwealth *v.* Standard Oil Company, 5 Out. 119, that "a tax upon the capital stock of the company is a tax upon its property and assets."

But it has never yet, so far as we know, been decided that the capital stock of a company and its property and assets are identical, or that any given part of the former represents any specific articles of the latter. It would be carrying the principle to a dangerous extreme to so decide. We hold, therefore, that the proportion of the capital stock of the defendant invested and used in Pennsylvania is taxable under these acts, and that the amount of the tax may be properly ascertained by taking as a basis the proportion which the number of miles operated by defendant in this state bears
219 to the whole number of miles operated by it, without regard to the question where any particular car or cars were used. Nor is it in our opinion of any consequence that some of the cars were leased for 99 years from another company on the conditions stated in the findings of fact above.

We need not even stop to determine the precise nature of the property which defendant has in them. Whatever it be, it is an asset of the company and is therefore represented by and helps to give value to its capital stock. It cannot change the case that the lessor company pays tax on its capital stock; that represents its interest, if any, in these cars. The questions involved need no further elaboration; we therefore briefly state the conclusions of law which we think are involved in the case:

1. The defendant is liable to tax on the proportion of its capital stock invested in this state as represented by coaches and cars owned and used by it here.

2. The fact that some of said coaches and cars have been leased from the Central Transportation Company for 99 years does not affect such liability.

3. The laws under which said taxes are imposed and said liability accrues are not in conflict with section 8 of article 1 of the Constitution of the United States.

4. Said company is not chargeable with penalty for failure to report, and with interest only from 60 days after the date of the settlement.

Determining the amount of the tax on the principles above stated it is as follows:

220	Tax for the years 1870 to 1880, inclusive.....	$16,321.89
	Interest from May 1, 1881, to May 10, 1883....	3,971.65
	Attorney-General's commission.....	816.09
	Total	$21,109.63

for which amount let judgment be entered unless exception be filed according to law.

The defendant excepted to the foregoing conclusions of law (other than the 4th) and filed the following additional exceptions:

9. The court erred in not finding as a conclusion of law that Pullman's Palace Car Company is not liable for taxation upon its own capital stock by reason of the cars leased from the Central Transportation Company.

10. The court erred in not finding as a conclusion of law that defendant being a corporation of the state of Illinois, is not taxable upon any proportion of its capital stock by reason of its permitting its cars to be transported into, out of or through this state, so long as they do not obtain a *situs* here.

11. The court erred in directing judgment to be entered in favor of the Commonwealth for $21,109.63.

12. The court erred in not ordering judgment to be entered in favor of defendant.

The court overruled the above exceptions and judgment was duly entered for the Commonwealth in accordance with the above decision. The defendant took this writ of error, assigning for error the dismissing of said exceptions, and the judgment.

M. E. Olmsted and O. A. Lochrane for plaintiff in error.

221 The claim in this case is controlled by the decision in Com'th *v.* Standard Oil Co., 5 Out. 119, that a tax upon capital stock is a tax upon property and assets within the state. But the Pullman Car Company had no capital invested in Pennsylvania aside from the inference sought to be drawn from its contract with the Central Transportation Company, a Pennsylvania corporation. For the convenience of the traveling public by avoiding repeated changes of cars upon connecting lines and over long routes of railroad, and to avoid inconvenience incident to the maintenance of this business under two different managements, it was found expedient in 1870 to enter into an agreement whereby Pullman's Palace Car Company became the lessee of the 119 cars of the Central Transportation Company, and undertook to perform the contracts of the latter company with the various railroads in Pennsylvania and elsewhere. By that contract the ownership of the cars remained in the Central Transportation Company, and that company has paid tax to the state on its entire capital stock, *i. e.*, on its entire property, which includes tax on these cars. To tax these cars again in the name of the Pullman Company is double taxation, not contemplated by the act of assembly. The Court found as a fact that no portion of the dividends of the Pullman Company accrued from the operation of these cars in Pennsylvania, for the rental paid to the Central Trans-

portation Company exceeded the gross receipts derived from the use of these cars in Pennsylvania.

But even if the Pullman Company owned the cars it would not be subject to taxation in respect thereof in Pennsylvania; The Pullman Company is a foreign corporation, and its cars are only temporarily in Pennsylvania while in transit to or from points in other
222 states; the cars have no *situs* here, and while being transported into, through and out of the state are protected from taxation by the commercial clause of the Federal Constitution.

State tax on foreign held bonds, 15 Wall. 319; Morgan *v.* Parham, 16 Wall. 471; St. Louis *v.* Ferry Co., 11 Wall. 423; Delaware Railroad Tax Case, 18 Wall. 229; Hays *v.* Pacific Mail S. S. Co., 17 How. 596; Com'th *v.* Standard Oil Co., 5 Out. 119; Appeal Tax Court of Baltimore Co. *v.* Pullman's Palace Car Co., 5 Md. 452.

Lewis C. Cassidy, Attorney General, and Robert Snodgrass, Deputy Attorney-General for the Commonwealth.

The opinion of the Court was delivered October 6, 1884. *Per Curiam:* We think it very clear that the plaintiff in error is engaged in carrying on such a business within this commonweaith as to subject it to the statutes imposing taxation. While a tax on the capital stock of a company is a tax on its property and assets, yet the capital stock of the company and its property and assets are not identical. The coaches of the company are its property. They are operated within this state. They are daily passing from one end of the state to the other. They are used in performing the functions for which the corporation was created. The fact that they are also operated in other states cannot wholly exempt them from taxation here. It reduces the value of the property in this state justly subject to taxation here. This was recognized in the Court below and we think the proportion was fixed according to a just and equitable rule.

Judgment affirmed.

223 EXHIBIT F FOR IDENTIFICATION (Cont'd).

141 UNITED STATES REPORTS, PP. 18–36.

PULLMAN'S PALACE CAR COMPANY
v.
PENNSYLVANIA.

Error to the Supreme Court of the State of Pennsylvania.

No. 1. Argued October 18, 1888.—Re-argument ordered November 5, 1888.—Re-argued March 6, 1890.—Decided May 25, 1891. A statute of a State, imposing a tax on the capital stock of all corporations engaged in the transportation of freight or passengers within the State, under which a corporation of another State, engaged in running railroad cars into, through and out of the State, and having at all times a large number of such cars within the State, is taxed by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within

the State bears to the whole number of miles in this and other Stat
over which its cars are run, does not, as applied to such a corporatio
violate the clause of the Constitution of the United States grantin
to Congress the power to regulate commerce among the sever
States.

This was an action brought by the State of Pennsylvania again
Pullman's Palace Car Company, a corporation of Illinois, in t
Court of Common Pleas of the county of Dauphin, in the State
Pennsylvania, to recover the amount of a tax settled by the audit
general and approved by the treasurer of that State, for the ye
1870 to 1880 inclusive, on the defendant's capital stock, taking
the basis of assessment such proportion of its capital stock
224 the number of miles of railroad over which cars were r
by the defendant in Pennsylvania bore to the whole numb
of miles in this and other States over which its cars were run.

All these taxes are levied under successive statutes of Penns
vania, imposing taxes on capital stock of corporations, incorpora
by the laws of Pennsylvania or of any other State, and doing bu
ness in Pennsylvania, computed on a certain percentage of divide
made or declared. The taxes for 1870-1874 were levied under
statute of May 1, 1868, c. 69, sec. 5, which applied to corporations
every kind, with certain exceptions not material to this case,
fixed the amount of the tax at half a mill on every one per cent
dividend. Penn. Laws, 1868, p. 109. The taxes for 1875–1
were levied under the statute of April 24, 1874, c. 31, sec. 4, wh
applied to all corporations in any way engaged in the transportat
of freight or passengers, and fixed the tax at nine-tenths of a mill
every one per cent. of dividend, Penn. Laws, 1874, p. 70. The t
for 1878–1880 were levied under the statutes of March 20, 1877,
sec. 3, and of June 7, 1879, c. 122, sec. 4, applicable to all corp
tions, except building associations, banks, savings institutions
foreign insurance companies, and fixing the tax at half a mill
each one per cent. of dividends of six per cent. or more on the
value of the capital stock, and, when the dividend was less, at t
mills on a valuation of the capital stock. Penn. Laws, 1877, p
1879, p. 114.

A trial by jury was waived, and the case submitted to the deci
of the Court, which found the following facts: "The defendant
corporation of the State of Illinois, having its principal offic
Chicago. Its business was, during all the time for which
225 is charged, to furnish sleeping coaches and parlor and din
room cars to the various railroad companies with whic
contracted on the following terms: The defendant furnished
coaches and cars, and the railroad companies attached and r
them part of their trains, no charge being made by either p
against the other. The railroad companies collected the usual
from passengers who travelled in their coaches and cars, and th
fendant collected a separate charge for the use of the seats, slee
berths and other conveniences. Business has been carried on
tinuously by the defendant in this way in Pennsylvania since
ruary 17, 1870, and it has had about one hundred coaches and

engaged in this way in the State during that time. The cars used in this State have, during all the time for which tax is charged, been running into, through and out of this State."

Upon these facts the Court held "that the proportion of the capital stock of the defendant invested and used in Pennsylvania is taxable under these acts; and that the amount of the tax may be properly ascertained by taking as a basis the proportion which the number of miles operated by the defendant in this State bears to the whole number of miles operated by it, without regard to the question where any particular car or cars were used," and therefore gave judgment for the State.

That judgment was affirmed, upon writ of error, by the Supreme Court of the State, for reasons stated in its opinoin as follows: "We think it very clear that the plaintiff in error is engaged in carrying on such a business within this Commonwealth, as to subject it to the statutes imposing taxation. While the tax on the capital stock of a company is a tax on its property and assets, yet the capital stock of a company and its property and assets are not iden-
226 tical. The coaches of the company are its property. They are operated within this State. They are daily passing from one end of the State to the other. They are used in performing the functions for which the corporation was created. The fact that they are also operated in other States cannot wholly exempt them from taxation here. It reduces the value of the property in this State, justly subject to taxation here. This was recognized in the court below, and we think the proportion was fixed according to a just and equitable rule." 107 Penn. St. 156, 160.

Pullman's Palace Car Company sued out a writ of error from this court, and filed six assignments of error, the substance of which was summed up in the brief of its counsel as follows: "The court erred in holding that any part of the capital stock of the Pullman Company was subject to taxation by the State of Pennsylvania by reason of its running any of its cars into, out of, or through the State of Pennsylvania in the course of their employment in the interstate transportation of railway passengers."

Mr. Edward S. Isham and Mr. William Barry argued for the plaintiff in error at the argument on the 18th of October, 1888.

Mr. Edward S. Isham and Mr. John S. Runnells argued for the plaintiff in error at the argument on the 6th of March, 1890.

Mr. W. S. Kirkpatrick, Attorney General of the State of Pennsylvania, argued for the defendant in error at both arguments. Mr. John F. Sanderson, Deputy Attorney General of that State, was with him on the brief in both cases.

Mr. Justice Gray, after stating the case as above, delivered the opinion of the Court.

Upon this writ of error, whether this tax was in accordance
227 with the law of Pennsylvania is a question on which the decision of the highest Court of the State is conclusive. The only question of which this Court has jurisdiction is whether the tax was in violation of the clause of the Constitution of the United States granting to Congress the power to regulate commerce among

the several States. The plaintiff in error contends that its cars could be taxed only in the State of Illinois, in which it was incorporated and had its principal place of business.

No general principles of law are better settled, or more fundamental, than that the legislative power of every State extends to all property within its borders, and that only so far as the comity of that State allows can such property be affected by the law of any other State. The old rule, expressed in the maxim *mobilia sequuntur personam,* by which personal property was regarded as subject to the law of the owner's domicil, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs,* the law of the place where the property is kept and used. Green *v.* Van Buskirk, 5 Wall. 307, and 7 Wall. 139; Hervey *v.* Rhode Island Locomotive Works, 93 U. S., 664; Harkness *v.* Russell, 118 U. S. 663, 679; Walworth *v.* Harris, 129 U. S. 355; Story on Conflict of Laws, sec. 550; Wharton on Conflict of Laws, secs. 297–311. As observed by Mr. Justice Story, in his commentaries just cited, "although movables are for many purposes to be deemed to have no *situs,* except that of the domicil of the owner, yet this being but a legal fiction, it
228 yields whenever it is necessary for the purpose of justice that the actual *situs* of the thing should be examined. A nation within whose territory any personal property is actually situate has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there."

For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner; and he may be taxed, on its account, at the place where it is, although not the place of his own domicil, and even if he is not a citizen or a resident of the State which imposes the tax. Lane County *v.* Oregon, 7 Wall. 71, 77; Railroad Co. *v.* Pennsylvania, 15 Wall. 300, 323, 324, 328; Railroad *v.* Peniston, 18 Wall. 5, 29; Tappan *v.* Merchants' Bank, 19 Wall. 490, 499; State Railroad Tax Cases, 92 U. S. 575, 607, 608; Brown *v.* Houston, 114 U. S. 622; Coe *v.* Errol, 116 U. S. 517, 524; Marye *v.* Baltimore & Ohio Railroad, 127 U. S. 117, 123.

It is equally well settled that there is nothing in the Constitution or laws of the United States which prevents a State from taxing personal property employed in interstate or foreign commerce like other personal property within its jurisdiction. Delaware Railroad Tax, 18 Wall. 206, 232; Telegraph Co. *v.* Texas, 105 U. S. 460, 464; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 206, 211; Western Union Telegraph Co. *v.* Attorney General of Massachusetts, 125 U. S. 530, 549; Marye *v.* Baltimore & Ohio Railroad, 127 U. S. 117, 124; Leloup *v.* Mobile, 127 U. S. 640, 649.

Ships or vessels, indeed, engaged in interstate or foreign commerce

upon the high seas, or other waters which are a common high-
229 way, and having their home port, at which they are regis-
tered under the laws of the United States, at the domicil of their owners in one State, are not subject to taxation in another State at whose ports they incidentally and temporarily touch for the purpose of delivering or receiving passengers or freight. But that is because they are not, in any proper sense, abiding within its limits, and have no continuous presence or actual *situs* within its jurisdiction, and, therefore, can be taxed only at their legal *situs*, their home port and the domicil of their owners. Hays *v.* Pacific Mail Steamship Co., 17 How. 596; St. Louis *v.* Ferry Co., 11 Wall. 423; Morgan *v.* Parham, 16 Wall. 471; Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196.

Between ships and vessels having their *situs* fixed by act of Congress, and their course over navigable waters, and touching land only incidentally and temporarily; and cars, or vehicles of any kind, having no *situs* so fixed, and traversing the land only, the distinction is obvious. As has been said by this court: "Commerce on land between the different States is so strikingly dissimilar, in many respects, from commerce on water that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the State and the Federal governments. No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade
230 and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature. So that State interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land." Railroad Co. *v.* Maryland, 21 Wall. 456, 470.

In Gloucester Ferry Co. *v.* Pennsylvania, on which the plaintiff in error much relies, the New Jersey corporation taxed by the State of Pennsylvania, under one of the statutes now in question, had no property in Pennsylvania except a lease of a wharf at which its steamboats touched to land and receive passengers and freight carried across the Delaware River; and the difference in the facts of that case and of this, and in the rules applicable, was clearly indicated in the opinion of the court as follows: "It is true that the property of corporations engaged in foreign or interstate commerce, as well as the property of corporations engaged in other business, is subject to taxation, provided always it be within the jurisdiction of the State." 114 U. S. 206. "While it is conceded that the property in a State belonging to a foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a

domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void, as an interference with, and an obstruction of, the power of Congress in the regulation of such commerce." 114 U. S. 211.

231 Much reliance is also placed by the plaintiff in error upon the cases in which this court has decided that citizens or corporations of one State cannot be taxed by another State for a license or privilege to carry on interstate or foreign commerce within its limits. But in each of those cases the tax was not upon the property employed in the business, but upon the right to carry on the business at all, and was therefore held to impose a direct burden upon the commerce itself. Moran *v.* New Orleans, 112 U. S. 69, 74; Pickard *v.* Pullman's Southern Car Co., 117 U. S. 34, 43; Robbins *v.* Shelby Taxing District, 120 U. S. 489, 497; Leloup *v.* Mobile, 127 U. S., 640, 644. For the same reason, a tax upon the gross receipts derived from the transportation of passengers and goods between one State and other States or foreign nations has been held to be invalid. Fargo *v.* Michigan, 121 U. S. 230; Philadelphia & Southern Steamship Co. *v.* Pennsylvania, 122 U. S. 326.

The tax now in question is not a license tax or a privilege tax; it is not a tax on a business or occupation; it is not a tax on, or because of, the transportation, or the right — transit, of persons or property through the State to other States or countries. The tax is imposed equally on corporations doing business within the State, whether domestic or foreign, and whether engaged in interstate commerce or not. The tax on the capital of the corporation on account of its property within the State, is, in substance and effect, a tax on that property. Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S., 196, 209; Western Union Telegraph Co. *v.* Attorney General of Massachusetts, 125 U. S. 530, 552. This is not only admitted, but insisted on by the plaintiff in error.

The cars of this company within the State of Pennsylvania are employed in interstate commerce, but their being so em-

232 ployed does not exempt them from taxation by the State; and the State has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and fro upon certain routes of travel. If they had never passed beyond the limits of Pennsylvania, it could not be doubted that the State could tax them, like other property within its borders, notwithstanding they were employed in interstate commerce. The fact that, instead of stopping at the State boundary, they cross that boundary in going out and coming back, cannot affect the power of the State to levy a tax upon them. The State, having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicil, could tax the specific cars which at a given moment were within its borders. The route over which the cars travel ex-

tending beyond the limits of the State, particular cars may not remain within the State; but the company has at *at* all times substantially the same number of cars within the State, and continuously and constantly uses there a portion of its property; and it is distinctly found, as a matter of fact, that the company continuously throughout the periods for which these taxes were levied, carried on business in Pennsylvania, and had about one hundred cars within the State.

The mode which the State of Pennsylvania adopted to ascertain the proportion of the company's property upon which it should be taxed in that State, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the State bore to the whole number of miles, in that and other States, over which its cars were run.

This was a just and equitable method of assessment; and,
233 if it were adopted by all of the States through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more.

The validity of this mode of apportioning such a tax is sustained by several decisions of this court, in cases which came up from the Circuit Courts of the United States, and in which, therefore, the jurisdiction of this court extended to the determination of the whole case, and was not limited, as upon writs of error, to the state courts, to questions under the Constitution and laws of the United States.

In the State Railroad Tax Cases, 92 U. S. 575, it was adjudged that a statute of Illinois, by which a tax on the entire taxable property of a railroad corporation, including its rolling stock, capital and franchise, was assessed by the state board of equalization, and was collected in each municipality in proportion to the length of the road within it, was lawful, and not in conflict with the Constitution of the State; and Mr. Justice Miller delivering judgment said:

"Another objection to the system of taxation by the State is, that the rolling stock, capital stock and franchise are personal property, and that this, with all other personal property, has a local *situs* at the principal place of business of the corporation, and can be taxed by no other county, city or town, but the one where it is so situated. This objection is based upon the general rule of law that personal property, as to its *situs*, follows the domicil of its owner. It may be doubted very reasonably whether such a rule can be applied to a railroad corporation as between the different localities embraced by its line of road. But, after all, the rule is merely the law of the

State which recognizes it; and when it is called into operation
234 as to property located in one State, and owned by a resident of another, it is a rule of comity in the former State rather than an absolute principle in all cases. Green *v.* Van Buskirk, 5 Wall. 312; like all other laws of a State, it is therefore subject to legislative appeal, modification or limitation; and when the legislature of Illinois declared that it should not prevail in assessing personal property of railroad companies for taxation, it simply exercised an ordinary function of legislation." 92 U. S. 607, 608.

"It is further objected that the railroad track, capital stock and

franchise is not assessed in each county where it lies, according to its value there, but according to an aggregate value of the whole, on which each county, city and town collects taxes according to the length of the track within its limits." "It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised, than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole." "This court has expressly held in two cases, where the road of a corporation ran through different States, that a tax upon the income or franchise of the road was properly apportioned by taking the whole income or value of the franchise, and the length of the road within each State, as the basis of taxation. Delaware Railroad Tax, 18 Wall. 206; Erie Railroad *v.* Pennsylvania, 21 Wall. 492." 92 U. S. 608, 611.

So in Western Union Telegraph Co. *v.* Attorney General of Massachusetts, 125 U. S. 530, this court upheld the validity of a tax imposed by the State of Massachusetts upon the capital stock of a telegraph company, on account of property owned and used by it within the state, taking as the basis of assessment such proportion of the value of its capital stock as the length of its lines within the State bore to their entire length throughout the country.

235 Even more in point is the case of Mayre *v.* Baltimore & Ohio Railroad, 127 U. S. 117, in which the question was whether a railroad company incorporated by the State of Maryland, and no part of whose own railroad was within the State of Virginia, was taxable under general laws of Virginia upon rolling stock owned by the company, and employed upon connecting railroads leased by it in that State, yet not assigned permanently to those roads, but used interchangeably upon them and upon roads in other States, as the company's necessities required. It was held not to be so taxable, solely because the tax laws of Virginia appeared upon their face to be limited to railroad corporations of that State; and Mr. Justice Matthews, delivering the unanimous judgment of the court, said:

"It is not denied, as it cannot be, that the State of Virginia has rightful power to levy and collect a tax upon such property used and found within its territorial limits, as this property was used and found, if and whenever it may choose, by apt legislation, to exert its authority over the subject. It is quite true, as the *situs* of the Baltimore and Ohio Railroad Company is in the State of Maryland, that also, upon general principles, is the *situs* of all its personal property; but for purposes of taxation, as well as for other purposes, that *situs* may be fixed in whatever locality the property may be brought and used by its owner by the law of the place where it is found. If the Baltimore and Ohio Railroad Company is permitted by the State of Virginia to bring into its territory, and there habitually to use and employ a portion of its movable personal property, and the railroad company chooses so to do, it would certainly be competent and legitimate for the State to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in the like

236 way by its own citizens. And such a tax might be properly assessed and collected in cases like the present, where the

specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases the tax might be fixed by an appraisement and valuation of the average amount of the property thus habitually used, and collected by distraint upon any portion that might at any time be found. Of course, the lawlessness of a tax upon vehicles of transportation used by common carriers might have to be considered in particular instances with reference to its operation as a regulation of commerce among the States; but the mere fact that they were employed as vehicles of transportation in the interchange of interstate commerce would not render their taxation invalid." (127 U. S. 123, 124.)

For these reasons, and upon these authorities, the court is of opinion that the tax in question is constitutional and valid. The result of holding otherwise would be that, if all the States should concur in abandoning the legal fiction that personal property has its *situs* at the owner's domicil, and in adopting the system of taxing it at the place at which it is used and by whose laws it is protected, property employed in any business requiring continuous and constant movement from one State to another would escape taxation altogether.

Judgment affirmed.

Mr. Justice Bradley, with whom concurred Mr. Justice Field and Mr. Justice Harlan, dissenting.

(Dissenting opinion omitted.)

Mr. Justice Brown, not having been a member of the court when this case was argued, took no part in its decision.

237 "EXHIBIT F" FOR IDENTIFICATION.

145 PENNSYLVANIA STATE, 96.

THE COMMONWEALTH
vs.
D., L. & W. R. R. Co.

Appeal by the Commonwealth from the Court of Common Pleas of Dauphin County.

Argued June 3, 1891; Decided June 12, 1891.

1. The capital stock of a domestic railroad corporation represented by its equipment in use interchangeably on its lines within and without the state is taxable under section four act of June 7, 1879, P. L. 114, and section 21 act of June 1, 1889, P. L. 429, in the proportion *of* its mileage operated in this state bears to its entire mileage. Pullman's Palace Car Co. *vs.* Commonwealth, 107, Pa. 156.

2. But the capital of such company invested in real estate and other railroads outside of the state, and in vessels, barges and tugs built, registered and used wholly outside the state is not subject to

such taxation; the said property being already chargeable in the states where it exists and is used; Commonwealth *v.* Dredging Co., 122 Pa., 386, distinguished.

Before Paxson, *C. J.*, Sterrett, Green, Clark, Williams, McCollom and Mitchell, *JJ.*

No. 49, May Term, 1891, Sup. Ct. Court below No. 248, January Term, 1891, C. P.

On November 11, 1890, under an account stated by the auditor general and state treasurer against the Delaware, Lackawanna & Western Railroad Co. for tax on capital stock under section 4, act of June 7, 1879, P. L. 114, and section 21, act of June 1, 1889, P. L. 429, for the year ending the first Monday of November, 1889, the company filed an appeal and specifications of objections.

On May 9, 1890, the cause having been heard on sub-
238 mission to the court without a jury, under the act of April 22, 1874, P. L. 109, the court, Simonton, *P. J.*, filed the following decision:

Findings of Fact.

1. This is an appeal from a settlement made by the auditor general and state treasurer on the 10th day of September, 1890, against the defendant for tax on capital stock for the year ending the first Monday of November, 1889, based upon a report made by defendant's secretary and treasurer as required by law. In said settlement defendant is charged with tax upon the whole amount of its capital stock of $26,200,000, amounting to $91,700. Defendant has paid $76,700 of said tax and has appealed from the remainder of said tax on the ground that it is levied on property outside of the taxing jurisdiction of the state of Pennsylvania, and that therefore the state has no right to tax said property and that the settlement is therefore invalid and unconstitutional.

2. We find the facts with reference to the situation and location of the property of defendant represented by its capital stock to be as follows:

The general office of the company is at No. 26 Exchange Place in the City of New York. Its capital stock is $26,200,000, and during the year ending as aforesaid there were declared and paid upon the said capital stock four dividends of 1¾ per centum each upon the 20th days of January, April, July and October respectively, making a total of 7 per centum for the year.

The main line of railroad owned by said company in Pennsylvania extends from the Pennsylvania and New York State line near Great Bend Village to the centre of a railroad bridge across
the Delaware river near Delaware Station, originally con-
239 structed jointly by the D., L. & W. R. R. Co., and the Warren Railroad Co., a corporation of New Jersey. The said main line of railroad in Pennsylvania is 114.61 miles in length. In addition thereto the company owns branch railroads in Pennsylvania as follows:

Lackawanna & Bloomsburg Branch, from Scranton to Northumberland, 80 miles.

Winton Branch, from Nay Aug to Winton, 7.50 miles.

Keyser Valley Branch, from Junction with main line to Keyser Valley, 6.43 miles.

Storr's Branch, from Storr's Junction to Storr's Mine, 2.80 miles.

The defendant also operates and has therein such interest as was conveyed by the agreement, a copy of which is hereto annexed and marked Exhibit A and made part of this finding, a railroad known as the Warren Railroad, extending from the center of the railroad bridge across the Delaware river hereinbefore mentioned to a point known as the Junction in the State of New Jersey, the said road being 18.80 miles in length, all in the state of New Jersey.

The Warren Railroad Co. from which the said Warren Railroad was acquired never owned any equipment, but the said road has been at all times and still is operated by the equipment furnished by the D. L. & W. R. R. Co. It is operated as part of the main line of the D. L. & W. R. R.

In addition to the railroads above mentioned the D. L. & W. R. R. Co. does now and did in 1889 operate under lease for the various terms of years the following railroads:

(Here followed a list of railroad lines, long and short, the greater number lying outside the state.)

The total miles of railroad owned, leased or controlled and operated by the D. L. & W. R. R. Co. is 891.41, of which 217.15
240 miles are in Pennsylvania, and 673.66 in New York and New Jersey. The total equipment owned by the D. L. & W. R. R. Co. was inventoried December 31, 1889, at $8,134,823. This equipment was used upon the entire system interchangeably with the equipment of such of the leased and controlled roads mentioned as possessed their own equipment; that is to say the leased equipment of roads in other states was used in Pennsylvania, and that owned by the D. L. & W. R. R. Co. was used in other states. It is difficult to determine precisely what should be considered the equipment of the roads in Pennsylvania and what the equipment of the roads outside of Pennsylvania. But we believe it would be fair to divide the aforesaid valuation of equipment owned by the company as follows, viz.:

Value of equipment for operation of roads in Pennsylvania	$5,075,342
Valuation of equipment owned by D. L. & W. R. R. Co. used on its road outside of Pennsylvania	3,059,481

The D. L. & W. R. R. Co. owns real estate outside of Pennsylvania located and valued as follows, viz:

Binghamton, N. Y.	$23,905.52
Buffalo, N. Y.	304,790.28
New York City	201,418.48
Rochester, N. Y.	23,185.03
Chicago, Ill.	51,740.60
Staten Island, N. Y.	1,609.35
Utica, N. Y.	50,388.05
Ore Lands in New Jersey	40,120.11
Syracuse, N. Y.	20,083.86

It also owns vessels, barges and tugs built, registered and used wholly outside of Pennsylvania of the value of $156,526.17.

241 3. The road owned by the D., L. & W. R. R. Co. in Pennsylvania was built primarily for the purpose of transporting to markets outside of the state the products of anthracite coal lands in said state; and the principal business of the railroads owned or leased and operated by said company in Pennsylvania does now and did in the year 1889 consist chiefly of the transportation of freight and passengers by continuous carriage upon a single way bill or ticket from points in Pennsylvania to points in other states, or from points in other states to points in Pennsylvania, or from points in another state passing through Pennsylvania to points in other states. The transportation upon said roads in Pennsylvania of freight and passengers local to Pennsylvania, that is to say between points both of which are within said state, did not in the year 1889 exceed say 19 per centum of the entire transportation business conducted upon said roads.

The ownership, interest or estate of the D., L. & W. R. R. Co. in the Warren Railroad Company is and was in the year 1889 of a fair cash value of not less than $1,000,000. In this estimate we do not include the equipment of the Warren Railroad, which is owned by the D., L. & W. R. R. Co.

An analysis of the facts shows that the total miles of railroad owned, leased or controlled and operated by defendant in the states of Pennsylvania, New Jersey and New York, amounting to 2,891.41 miles there are in Pennsylvania 217.75 miles and outside of Pennsylvania 673.66 miles; and that defendant owns the equipment of 147.31 miles of the roads outside of Pennsylvania, the remaining 526.35 miles of road being equipped by the several corporations from which the defendant has leased said roads or which are controlled by it by reason of its ownership of stock therein.

242 As it does not appear from the evidence or findings of fact that the defendant has any of its property represented by its capital stock invested in these 526.35 miles of road we think they cannot be included in any computation of the proportion of the capital stock not taxable by the state of Pennsylvania. After excluding these we have a proportion of 217.75 miles in Pennsylvania and 147.31 miles outside of Pennsylvania upon which the equipment is owned by the defendant and is used interchangeably. The total value of the equipment owned by it we have found to be $8,134,823, and therefore the proportion of defendant's capital stock

represented by this sum is taxable only in the proportion thus indicated. It is true that the findings of fact show that the equipment owned by the other roads leased or controlled by the defendant is used interchangeably upon the roads of said companies and defendant's own road in Pennsylvania, but we think this furnishes no ground for including the mileage of said roads in the apportionment; for, if this were done, we must necessarily also have the value of their equipment, which is not given, and it is fair to assume that if their equipment was not used in Pennsylvania there would be a correspondingly larger proportion of the equipment owned by the defendant in this state.

The findings of fact show that the value of the leasehold interest held by defendant in the Warren Railroad is $1,000,000. This excludes the idea that any large proportion of capital stock of defendant is represented by said leasehold interest or is invested in said road, and therefore the only exemption which can be conferred upon defendant's capital stock is the exemption of $1,000,000 of its capital stock. In arriving at these proportions we assume
243 the value of assets to be the same as the par of the capital stock, the tax being levied on the basis of the amount of dividends declared and not upon the appraisement.

The legal questions here involved are practically the same as some of those which were considered in the case of the Commonwealth *v.* Pennsylvania Co., June Term, 1889, of Dauphin County Common Pleas, and for the reason there given, which we need not here repeat, we think that the amount of the capital stock of the defendant represented by the value of its equipment should be apportioned for the tax according to the proportions 217.75 taxable and 147.31 miles not taxable, and that the amount of its capital which represents the value of its interest in the lease of the Warren Railroad, as well as the amount which represents its investment in real estate outside of the state of Pennsylvania, and the amount which represents its investment in vessels, barges and tugs built, registered and used wholly outside of Pennsylvania, are exempt from taxation by the state of Pennsylvania.

We embody these results in the following

Conclusions of Law.

1. Defendant is not liable to taxation by the state of Pennsylvania on so much of its capital stock as is represented by the value of its leasehold interest in the Warren Railroad; and the settlement hereby appealed from so far as it taxes said investment is erroneous and illegal.

2. Defendant is liable to taxation by the state of Pennsylvania only on $\frac{174.31}{365.06}$ parts of the whole amount of its capital stock invested in equipment, this being the proportion which the number of miles operated and equipped by it in the state of Pennsylvania bears to the whole number of miles operated and equipped by it;
244 and the settlement appealed from so far as it taxes any greater amount of capital so invested is erroneous and illegal.

3. Defendant is not liable to taxation by the state of Pennsylvania on so much of its capital stock as is represented by the value of the real estate owned by it outside of Pennsylvania; and the settlement appealed from so far as it taxes said amount is erroneous and illegal.

4. Defendant is not liable to taxation by the state of Pennsylvania on so much of its capital stock as is represented by the value of its vessels, barges and tugs owned by defendant which were built and are registered and used wholly outside of the state of Pennsylvania; and the settlement appealed from so far as it taxes said investment is erroneous and illegal.

5. Defendant having paid to the treasurer of the state of Pennsylvania the whole amount of tax legally due of the settlement appealed from, judgment is directed to be entered in favor of the defendant, if exceptions be not filed within the time limited by law.

To the foregoing decision both parties filed exceptions.

Said exceptions being argued, one of them filed by the Commonwealth was sustained by the following additional finding:

The company defendant is a domestic corporation, having been duly chartered by the act of March 11, 1853, P. L. 163, which act, together with the acts therein referred to, and the supplements thereto, is made a part of this finding of fact.

The other exceptions being overruled and judgment entered in accordance with the decision filed, the Commonwealth took
245 this appeal, specifying that the court erred

1, 2, in the first and second conclusions of law.

3, in not holding that the whole of defendant's capital stock invested in equipment was taxable in Pennsylvania.

4, in not holding that the whole of defendant's capital stock invested in leasehold interests was taxable in Pennsylvania.

5, 6, in directing judgment to be entered in favor of the defendant, and in not directing judgment to be entered in favor of the plaintiff for the amount claimed.

Mr. W. U. Hensell, Attorney General, and Mr. Jas. A. Stranahan, Deputy Attorney General for the commonwealth.

Counsel cited generally: Commonwealth *v.* Standard Oil Co., 101 Pa. 119; Pennsylvania *v.* Trenton Bridge Co., 9 Am. L. Reg. N. S. 298; Commonwealth *v.* Railroad Co., 29 Pa. 370; Commonwealth *v.* Railroad Co., 2 Pears. 391; Pittsb. etc. Ry. Co. *v.* Commonwealth, 66 Pa. 73; Pennsylvania Co. *v.* Commonwealth, 22 W. N. 340; Pullman's Palace Car Co. *v.* Commonwealth, 107 Pa. 156.

As to the taxation of the equipment of a domestic corporation:

Commonwealth *v.* Dredging Co., 122 Pa. 386; Pacific R. Co. *v.* Cass Co., 53 Mo. 17; Orange R. Co. *v.* Alexandria, 17 Gratt. 176; Hays *v.* Steamship Co., 17 How. 596; St. Louis *v.* Wiggins Ferry Co., 7 Wall. 423; Sangamon, etc., R. Co. *v.* Morgan Co., 14 Ill. 163, 56 Am. Dec. 497; Welkey *v.* Pekin, 19 Ill. 160; Ontario Bank *v.* Bunnell, 10 Wend. 187; Burroughs on Taxation, 186; Cooley on Taxation, 273; Balt. & O. R. Co. *v.* Allen, 17 Am. & Eng. R. Cas. 464.

246 As to its leasehold interest:

State *v.* Railroad Co. (44 Conn. ?), 7 Am. & Eng. R. Cas.

238; Archer *v.* Railroad Co., 102 Ill. 493 (7 Am. & Eng. R. Cas. 249);

Mr. M. E. Olmsted for the Appellee.

Distinguish Commonwealth *v.* Dredging Co., 122 Pa. 386, counsel cited:

Pullman's Palace Car Co. *v.* Commonwealth, 107 Pa. 156; Pullman's Palace Car Co. *v.* Twombley, 29 Fed. R. 658.

As to defendant's interests in the Warren Railroad:

Commonwealth *v.* Standard Oil Co., 101 Pa. 119; Commonwealth *v.* Dredging Co., 122 Pa. 386; Caldwell *v.* Fulton, 31 Pa. 475; Delaware, etc., R. Co. *v.* Sanderson, 109 Pa. 583; Cincinnati College *v.* Yeatman, 30 Ohio St. 276.

Per Curiam: We are unable to see that the ruling of the court below is in conflict with Commonwealth *vs.* Standard Oil Co., 101 Pa. 119. That company is a foreign corporation, and it was held that it was not the intention of our taxing acts to tax the whole capital stock of such corporations doing business within this Commonwealth irrespective of the place of its investment, but to tax the property of such company, that is to say its capital stock, to the extent that it brings such property within the state in the transaction of its business. This is the only equitable rule which will secure to the Commonwealth its fair proportion of tax and yet enable such corporations to carry on their legitimate business. For, if a corporation having its *situs* in one state and transacting business in every other state of this country can be taxed in each state to the full amount of its capital stock, the result is confiscation.

The defendant here is a domestic corporation, and it was
247 contended that its capital invested in equipment used interchangeably on its main line in this state, and its leased lines in other states, is not exempt from taxation in this state. The court below held otherwise, and from this decision the Commonwealth has appealed.

It is true that the *situs* of a domestic corporation is in this state, and that for many purposes the domicil of the person, whether natural or artificial, draws to it the personal property belonging to such owner. That this is so as to such intangible property as is not the subject of taxation elsewhere, such as money at interest, may be conceded; but for the purposes of taxation tangible personal property has a *situs* wherever it may be found. Hence it was held in Pullman's Palace Car Co. *vs.* Commonwealth, 107 Pa. 156, the said company being a foreign corporation, that the proportion of the capital stock of the company invested and used in Pennsylvania is taxable here, and that the amount of the tax may be properly ascertained by taking as a basis the proportion which the number of miles operated by the company in this state bears to the whole number of miles operated by it, without regard to the question where any particular car or cars are used, this court saying in its opinion:

"They (the cars) are operated within this state. They are daily passing from one state to the other. They are used in performing the functions for which the corporation was created. The fact that they

are also used and operated in other states cannot wholly exe
them from taxation here."

This case has recently been affirmed by the Supreme Court of
United States, although the report of the case has not yet reache
On the other hand, we held in Commonwealth *v.* Dredging Co.,
Pa. 386, that the dredges which were the subjects of the
248 troversy were taxable at the *situs* of the company for
reason that although wholly used outside of the Comm
wealth they did not remain at any one place long enough to re
them liable to taxation there, this court saying in its opinion:

"From the nature of the business it is in one place to-day an
another to-morrow, and hence not taxable in the jurisdiction w
temporarily employed. It follows that if not taxable here it esc
altogether."

It may be that in the case of a domestic corporation the Comm
wealth would have the power to tax its entire capital stock, no ma
where found or how invested, and notwithstanding that the whol
the greater portion of its stock only was invested in tangible prop
located and used in other states and liable to taxation by the law
those states. But the Commonwealth is not a bandit with a pist
the throat of every property owner. On the contrary, she imp
no greater burdens than the necessities of the state require; and
endeavors at least to impose those burdens in as equitable a man
as the wisdom of the legislature and the difficulties of the sub
admit.

We do not think it was error for the learned court below to l
that the defendant was not liable to taxation by this state on its
terest in the Warren Railroad. That road is wholly outside of
state; and whatever the defendant's interest therein may be,
liable to taxation by the state of New Jersey. We think it co
within the principles above indicated.

Judgment affirmed.

249 AMERICAN AND ENGLISH RAILROAD CASES (NEW SERI
VOLUME 14, page- 145-174 (188 Penna., 169).

COMMONWEALTH
v.
NEW YORK, P. & O. R. Co.

(Supreme Court of Pennsylvania, Oct. 17, 1898.)

TAXATION—CAPITAL STOCK.—Within the meaning of the s
1891 of Pennsylvania, providing for the taxation of "all the prop
of corporations * * * having capital stock, at the rate of five m
on each dollar of its actual value," a tax on the capital stock is a
on the property and assets, including the corporate franchises.

SAME—SAME—DEDUCTION OF INDEBTEDNESS.—Under such
ute the question of the actual value in cash of the capital stock
question of fact, which must be determined by considering the v
of the corporate property, and assets of every kind, including its bo

and mortgages, and moneys at interest, and its franchises and privileges, and the amount of the incumbrances on its property and franchises is also a relevant fact to be considered, but the corporate indebtedness, though it should be considered, is not to be specifically deducted from the valuation so ascertained and determined.

* * * * * * *

FINDINGS—PRESUMPTIONS.—Defendant's counsel having made no request for a specific finding as to what extent the value of its capital stock was effected by its indebtedness, it will be assumed that such element was properly considered.

VALUE OF CAPITAL STOCK—DISCRIMINATION.—Under such statute, the actual value of capital stock being a pure question of fact, a corporation cannot complain of discrimination in the method
250 adopted to ascertain such value so long as its stock is not assessed in excess of such value.

Appeal by the company from Dauphin county court of common pleas. *Affirmed.*

The findings of fact and opinion of the court below are as follows:

This is an appeal from a settlement made by the auditor general and state treasurer against the corporation defendant June 30, 1896, for tax on capital stock for the tax year 1895. It was tried by the court without a jury, as provided by the act of April 22, 1874, and, on the testimony and documentary evidence, we find the following facts:

"(1) Defendant is a corporation chartered under the laws of the states of New York, Pennsylvania and Ohio, owning a line of railroad extending from Salamanca, New York, across the northwestern part of the state of Pennsylvania, to Dayton, Ohio, a distance of 388.04 miles. Of this line, 92.4 miles are within the state of Pennsylvania, and the remainder in either New York or Ohio. Defendant also owns a line of railroad 33.78 miles in length, known as the 'Franklin Branch,' extending from Buchanan to Oil City, all in Pennsylvania. It also owns a branch 7.7 miles in length in Ohio; making the total mileage owned by [illegible]429.52 miles. It is also lessee of 168.09 miles of road, of which 34[illegible] miles are in Pennsylvania, and the remainder in Ohio. It connects at Salamanca, its eastern terminus, with the railroad of the New York, Lake Erie and Western Railroad Company, and by a connection at Dayton, Ohio, its western terminus, it forms, by means of leases and trackage contracts, part of the through line of the last named road from the city of New York to the cities of Cincinnati and Chicago.

"(2) Defendant's capital was, in 1895, $44,999,350, divided into
899,987 shares, of the par value of $50 each; 200,000 shares,
251 or $10,000,000, being preferred stock, and 699,987 shares, or $34,999,350, common stock. The cost of defendant's road and equipment was $170,987,519.58. No dividends were ever paid on either the preferred or common stock.

"(3) In 1895 defendant's indebtedness amounted to $129,853,080.72, as follows: Prior lien bonds, $8,000,000; first-mortgage bonds, $44,337,000; deferred warrants converted into first mortgage bonds, representing unpaid interest on $27,640,345.75; second mort-

gage bonds, $14,500,000; third mortgage bonds, $30,000,000; car trust agreements, subject to which the company held its active rolling stock, $1,950,000, and a small unsecured balance. Defendant has not for many years earned or paid any interest on its second or third mortgage bonds, and no interest was paid in 1895, on its first mortgage bonds, though some was earned. The interest on the $8,000,000 prior lien bonds was paid. Nearly all defendant's indebtedness is due to citizens or corporations of other states and countries than Pennsylvania.

"(4) In April, 1883, it leased its line and road to the New York, Lake Erie & Western Railroad Company, for ninety-nine years, the terms of the lease requiring the lessee to pay to defendant thirty-two per cent. of the gross receipts derived from the operation of the road. The gross receipts in the tax year 1895 amounted to $6,332,317.52, and the proportion due to defendant was $2,062,000. In 1893 the lessee became insolvent, and passed into the hands of receivers appointed by the circuit court of the Southern district of New York; and by virtue of an agreement not clearly explained in the evidence, and of a decree of that court, the receivers were ordered to pay
252 to the defendant, instead of the agreed rental, only the net earnings received from the operation of its road, not less, however, than $1,500,000; and defendant, during the tax year 1895, actually received as rental only $1,411,573.96, and it had during that time receipts from other sources amounting to $52,029.49. During its fiscal year ending June 30th, 1895, its gross income from all sources was $2,042,307.15, and during 1895 there were expended upon its road, in betterments, $2,931,686.31. From what source the amount thus expended was derived is not definitely shown by the evidence.

"(5) During the months of April, May and June of 1895, 4,200 shares of the preferred stock of the defendant were sold, in the city of New York, at prices ranging from 62½ to 87½ cents per share, the average price being 75 cents. There were no shares of common stock sold during the tax year 1895.

"(6) An order of sale of defendant's road was granted in January, 1896, at the suit of the holders of the bonds secured by the first mortgage on its road and franchises; and, in pursuance of this order, all of its property, leasehold and otherwise, including defendant's franchises, was on the 26th of February, 1896, sold at public auction, at the court house in Akron, Ohio, for the sum of $10,000,000, subject to the prior lien mortgage of $8,000,000; and the proceeds of the sale were appropriated towards the payment of the first mortgage bonds, the holders of subsequent liens receiving nothing.

"(7) On February 21, 1896, the secretary and treasurer of the defendant company, after having taken the oath prescribed by the act of June, 1891, made the report to the auditor general required by said act, and appraised the capital stock of said corporation as
253 of no value whatever. The auditor general and state treasurer being dissatisfied with the appraisement and valuation so made and returned, value- and appraised the capital stock of defendant for the tax year 1895 at $34,480,577.70, stating at length in their

appraisement their reason for so doing, and settled an account in accordance with said appraisement, charging defendant with a tax at the rate of five mills, amounting to $172,402.88, from which settlement defendant appealed to this court; and, on the trial, the report and appraisement made by the defendant's officers, the appraisement and settlement made by the auditor general and state treasurer, defendant's specifications of objections to the settlement, and other evidence, oral and documentary, was offered and heard.

"(8.) After a full consideration of all the relevant evidence in the case, we find that the appraisement made by the defendant's officers is not correct, and that the appraisement made by the auditor general and state treasurer is excessive; and we further find that the actual value in cash of defendant's capital stock, representing its tangible property and its franchises between the 1st and 15th of November, 1895, was $15,000,000, and that defendant is taxable for the tax year 1895, at the rate of five mills on 126.18—510.20 of said fifteen millions, that being the proportion of defendant's capital stock which represents the proportion of its road, property, assets, franchises and privileges in Pennsylvania, calculated on the mileage basis.

"Discussion.

"In Com. *v.* Standard Oil Co., 101 Pa. St., 119, Mr. Justice Paxson, delivering the opinion of the court, said: 'It has been re-
254 peatedly decided, and is settled law, that a tax upon the capital stock of a company is a tax upon its property and assets,'—citing a number of cases in this state, and many from other states. In Appeal of Fox, 112 Pa. St. 337, 4 Atl. 149, it was held that the mortgages owned by corporations are taxed through the tax on capital stock in substantially the same manner as the mortgages belonging to individuals are taxed by the act of 1885, which requires them to report to the assessors and pay a tax upon the par value of their mortgages, and that, if corporations were required to report and pay tax under that act of 1885, the result would be double taxation. Speaking in this case of capital stock in itself considered, Justice Paxson says: 'The capital stock is nothing, a myth; a mere name, excepting in so far as it is represented by investments made with the money paid into the treasury of the corporation on account of such capital stock. Hence it is that the courts have long since declared that a tax upon the capital stock of a corporation is a tax upon the assets and property of such corporation.' The opinion of the court below in Com. *v.* Western Land & Imp. Co., 156 Pa. St. 455, 26 Atl., 1034, contains a history of this tax, and shows that it has always been assessed on the basis of the rate per cent. of dividends when the dividends during the tax year equalled or exceeded six per cent., and, when no dividend was made, on an appraisement of the capital stock; and when the dividend was less than six per cent., under some of the acts, the tax was assessed on the basis of the rate per cent. of the dividend and, under others, on the assessed value of the capital stock. That case decides that, when the tax is measured by the rate per cent. of the dividend, that is the only test; and some of the cases

255 there cited illustrate this very forcibly, and show that the value indicated by the rate per cent. is sometimes very different from the actual value. Thus, in Atlantic & Ohio Tel. Co. *vs.* Com., 66 Pa. St. 57, where the report of the officers of the corporation stated that a dividend of ten per cent. had been made, it was held that the dividend reported furnished the measure of the tax, although the corporation proved that it has in reality been paid upon a part only of the stock. And in Columbia Conduit Co. *vs.* Com., 90 Pa. St. 307, where, after declaring dividends amounting to $200,000, a loss by fire occurred to which nearly one-half of the declared dividend was applied, instead of being paid to the stockholders, the whole dividend was, nevertheless, held to furnish the measure of the tax. And in Maston's Ford Bridge Co. *v.* Com., 117 Pa. St. 265, 11 Atl. 813, where all the property of a corporation with a capital of the par value of $45,000 was converted into money, and amounted to $75,000, the excess of $30,000 above the par value of the capital stock was held to be a dividend, and the company was assessed thereon with a tax of one-half mill on each one per cent. amounting to $1,500, which would be a three-mill tax upon $500,000. And in Com. *v.* Fall Brook Coal Co., 156 Pa. St. 488, 26 Atl. 1071, it was decided that a tax on the capital stock of the Fall Brook Railway Company was a tax on $3,500,000, which the Fall Brook Coal Company held invested in the shares of the railway company, and that to tax that amount of the capital stock of the coal company after the railway company had paid the tax on its capital stock would be double taxation.

"It thus appears that under the acts taxing capital stock, as they stood prior and up to 1891, the amount of dividend declared during the tax year was the only test of the amount of the tax, and that this had no necessary relation to the actual value of the capital 256 stock of the corporation. When the dividends did not amount to the rate which by the taxing acts was made the measure of the tax, the capital stock of the company was required to be appraised, and a tax at the rate of originally three mills afterwards five, was assessed upon its appraised value. This appraisement, it is true, was formally of the capital stock, and not of the property of the corporation; and the data required to be furnished to the auditor general, by the terms of the acts, to enable him to judge of the correctness of the appraisement, related to the operations of the company during the year, the amount of its capital stock, and the value of its shares, more directly than to the quantity, quality, and value of its assets and property. The inference sought to be drawn from this by the learned counsel for defendant is that, as the value of the shares would be affected by the amount of indebtedness and incumbrances upon the property of the corporation, the practical result was that the tax, so far as it was a tax upon the property of the company, was a tax only on the value of its property, less the amount of its indebtedness and incumbrances; but it must be remembered that this basis of assessment was adopted in 1844, when the corporations to which it applied were mainly banks and other moneyed institutions which did not have incumbrances, and

whose indebtedness was mainly for deposits that were a source of profit to the corporations.

The subjects of the tax are said in the act of 1844 (P. L. 486) to be 'all banks, institutions and companies.' An appraisement of the shares of such corporations at not less than the price at which they sold in the market would furnish a fairly accurate measure of the value of the assets and property of the company. That
257 by ' institutions,' in the act of 1844, the legislature intended moneyed corporations, is shown by the act of April 16, 1845 (P. L. 507), where the subjects of the tax on capital stock imposed by the act of 1844 are styled 'banks and savings institutions.' And in the capital stock act of 1859 (P. L. 529) the subjects of the tax are styled 'banks, savings institutions and companies whatsoever.' It was not until after the passage of the act of February 23, 1866 (P. L. 82), that banks ceased to be the principal corporations subject to the tax on capital stock. By the act of May 1, 1868 (P. L. 108), the amount of the dividend declared by the corporation was made the measure of the tax on its capital stock in every case where any dividend was made, and it was only in cases where no dividend whatever was made that the officers of the corporation were required 'to estimate and appraise the capital stock of such companies at its actual value in cash.' This act contains no suggestion that the appraised value should be the value of the property and assets of the corporation less its indebtedness. The act of April 24, 1874 (P. L. 68), which superseded the act of May 1, 1868, was practically identical with it on this subject, except that the officers of the corporation were required to estimate and appraise the capital stock of such companies upon which no dividend had been made or declared, at its value, not less than the average price which said stock sold for during said year;' and that it also contained the proviso 'that if the auditor general or state treasurer, or either of them, is not satisfied with the valuation so made and returned, they are hereby authorized and empowered to make a valuation thereof, and to settle an account upon the valuation so made for the taxes, penalties and interest due the commonwealth.' This proviso contains at least an implica-
258 tion that, even if the appraisement were not less than the average selling price, it might be too low, and no restriction was put upon the accounting officers in making the appraisement, nor did the act require them to deduct incumbrances. The act of June 7, 1879, required the capital stock to be appraised when no dividend or dividends less than six per cent. had been declared during the year and contained a further limitation of minimum value in the appraisement, by requiring not only that it should be 'not less than the average price which said stock sold for during said year,' but also that it must be not less than the average price or value as indicated or measured by the amount of dividends made or declared.' Under this act occurred the case of Hamilton Steeled Wheel Co. *v.* Com. 12 Wkly. Notes cas. 328, where $1,000,000, the whole capital of the corporation, had been invested in patent rights which would soon expire, and the officers of the company appraised the capital stock for the year 1879 at $110,000, and for the year 1880 at

$100,000, on the theory that as the patent had only two years to run, and the whole value of the capital stock was invested in the patent, the stock was not worth more than that amount. The company, however, had made a dividend of four per cent., which, in the judgment of the accounting officers, indicated a value of at least $500,000, and they therefore assessed it at that amount. The court below decided that under the circumstances the value of the capital stock 'must be as measured and indicated by the amount of dividends made and declared. However unjustly it might operate in particular cases, there can be no doubt of its meaning and the manner of valuing which it indicates and points out.' On appeal to the Supreme Court, this ruling was affirmed, on the opinion of
259 the learned judge of the court below, President Judge Pearson. The next act in order was the act of 1889, which contained the same minimum limitation of value as the act of 1879.

"We thus find that, under all the acts taxing capital stock, the amount of tax was either fixed by the rate per cent. of the dividends (in which case that was the sole measure of the tax, regardless of the actual value of the property and assets of the corporation), or it was imposed on the appraised value of the stock, subject to the limitation in the earlier acts, that the amount of the appraisement should not be less than the value indicated by the selling price of the stock (which would fairly indicate its value when the subjects of the tax were banks and institutions of that nature), and afterwards by the limitation that it should not be less than the value indicated by the amount of dividends or profits made. The nature of the test of value was in all cases an inquiry into the result of the activity of the corporations for the tax year, and an inference of value from these results, rather than a direct estimate of the value of the tangible property and assets of the corporation. There was, we think, ample reason for this. The value of the property and assets of a railroad corporation, for instance, cannot be ascertained by appraising its buildings, rails, bridges, cars, etc. It is all these in operation—their use as a railroad, with the franchise or right to use them, and to charge fares and freight for so doing—that really constitute the property and assets of the corporation; and this is what is represented by its capital stock. There has been, however, a large class of cases in which it became necessary to have a more direct reference to the tangible property and assets of the corporation in making the appraisement. This was so in all cases where, by the terms of the taxing act, or because of the nature or *situs* of the property
260 of the corporation, some of it was subject to taxation, and some exempt. Thus, the capital stock of manufacturing corporations have been since 1885 exempt from taxation; but as this exemption was held to apply only to the proportion of the capital stock that represented property actually used in the business of manufacturing, while property not so used was held taxable, it became necessary to ascertain the value of the property in order to determine the proportion of the capital stock taxable and exempt. And when corporations, whose capital stock was subject to the tax, owned property which could not be taxed because of its nature,—as,

for instance, patent rights or United States bonds,—or because it was located out of the state, it became necessary to ascertain the actual value of the property. Com. *v.* Westinghouse Air Brake Co., 151 Pa. St. 276, 24 Atl. 1111, 1113; Com. *v.* Westinghouse Electric & Mfg. Co., 151 Pa. St. 265, 24 Atl. 1107, 1111; Com. *v.* Juniata Coke Co., 157 Pa. St. 507, 27 Atl. 373; Com. *v.* Pennsylvania Coal Co., 5 Co. Ct. R. 89, and Com. *v.* MontgomeryLead and Zinc Min. Co., *Id.* 91,—are cases of this kind, as is also Com. *v.* Standard Oil Co., 101 Pa. St. 119.

"Another like case is Com. *v.* Pennsylvania Co., 145 Pa. St. 274, 23 Atl. 549, to which the learned attorney general has referred. This case was elaborately argued and considered in the court below, where it was conceded that if the corporation was taxable at all, which was denied, the tax was upon its property and assets, and that the value and nature and *situs* of these must be ascertained in order to determine the amount of the tax, and the date from which these could be ascertained was furnished by the defendant. The
261 court below decided that the defendant was taxable on the amount of its capital stock represented by investments in real estate in Pennsylvania, personal property in Pennsylvania stocks of foreign corporations, bonds of foreign corporations, and bonds of domestic corporations, and on the proportion of its capital stock represented by investments in equipment or rolling stock which was found to be within the state, by apportioning the whole amount invested in equipment on the basis of its mileage within and without the state, as shown by the facts and exhibits. The case was appealed to the supreme court, and error was there assigned to these rulings, and to these only; and the case was argued on the questions thus raised, but none of these questions were decided by the supreme court. The only point decided was, as stated at the close of the opinion (145 Pa. St. 283, 23 Atl. 552), 'that after the lapse of a year from the time of payment of the taxes of a current year, without any request for the restatement of the account of the taxpayer, the account is closed, except as to clerical mistakes, and can only be reopened by an order of the board of revision.' This was an application of the provisions of section 16 of the act of March 30, 1811, relative to public accounts (which had been applied by the court below to the settlements for 1872 and 1873, because for those years the accounts were resettlements), to the settlements for the subsequent years, which were original settlements, and not resettlements. That this was done under a misapprehension of the facts is manifest. The learned justice who wrote the opinion evidently supposed that all the state taxes to which a corporation is subject for a given year are settled and included in one account, and did not know that it is, and always has been, the uniform practice of the accounting
262 department to require reports and settle accounts separately for each kind of tax to which a corporation is subject, and that a settlement for one kind of tax does not imply any consideration or determination of its liability or otherwise for tax of a different kind. An account or settlement is a physical, tangible thing,—a paper with figures and writing upon it, signed by the auditor general

and state treasurer, indorsed, copied into a ledger, and filed away in its appropriate place. Whether such a settlement has been made against a given corporation, for a tax of a given year, is therefore a question of fact, to be ascertained by looking in the proper place for the settlement. Such inspection showed at the time this case was tried, and it would now show, that there had never been any settlement made against the Pennsylvania Company for the years from 1874 to 1887, inclusive, for tax on capital stock; and the court below found this as one of the facts in the case. The settlements then in question for those years were therefore original settlements, and not resettlements, as was supposed, while those for 1872 and 1873 were resettlements; and this is the reason why the court below held the latter invalid, and those for the subsequent years valid. It was not claimed by the counsel for defendant, who are experts in tax cases, that the settlements for the years subsequent to 1873 were resettlements; and therefore the ruling of the court below on this subject was not assigned for error, and hence the supreme court were not assisted by the argument of counsel in coming to the conclusion reached by them which probably accounts for the misapprehension. The result is that we are without a decision of the court of last resort on the question decided in the court below, and discussed in the supreme court. The case is, however, valuable, as it shows that
263 it was conceded and understood, both by the counsel and the court, that the tax in question was the tax upon the property of the corporation, the value of which it was necessary to appraise, and that the only controversy—if the corporation was taxable—was as to the method of apportionment, and that it was not even suggested by the learned counsel that the indebtedness of the corporation should be deducted in order to ascertain the value.

"We have now reviewed all the acts taxing capital stock prior to the act of June 8, 1891 (P. L. 229), and referred to many of the decisions in which these acts are construed and applied; and we have nowhere found it to be enacted or decided that, in estimating and appraising the value of the capital stock, any deduction is to be made because of the fact that the property of the corporation is incumbered. This question has, it is true, never been directly litigated and adjudicated, but the implication contained in the acts, from the fact that there is no provision on the subject, and that no claim has ever been made for a deduction of this account, is strong that such was not the intention of the acts. It remains to consider the effect of the act of 1891, under which the settlement appealed from in this case was made. The title to this act is 'An act to provide increased revenues for the purpose of relieving the burdens of local taxation * * * and providing for greater uniformity of taxation by taxing all the property of corporations, limited partnerships and joint stock associations having capital stock, at the rate of five mills on each dollar of its actual value.' We think we find here a distinct declaration that the purpose of this act is to impose a tax upon the property of the corporation to which it applies. Defendant's counsel contends that the antecedent of 'its,'
264 in the concluding words of the title, 'five mills on each dollar of "its" actual value,' is 'capital stock.' But the plain read-

ing of the sentence, required alike by its grammatical and logical construction, is that it declares an intention to tax 'at its actual value in cash all the property' of certain corporations, limited partnerships, and joint-stock associations, to wit, those 'having capital stock.' This construction is not in conflict with the expressions used in preamble 6, where it is evident that 'capital stock' is used as a synonym for bonds, mortgages and moneys at interest, and franchises and property of other kinds; and, being so used in the preamble, we think we are warranted in assuming that it is used in the same sense in the body of the act. This act also made important changes in the method of assessing the tax. The rate per cent. of dividend is no longer the measure of the amount of tax, but in all cases the capital stock is to be estimated and appraised by the officers of the corporation 'at its actual value in cash, not less, however, than the average price which said stock sold for during said year, and not less than the price or value indicated or measured by net earnings or by the amount of profit made and either declared in dividends or carried into surplus or sinking fund.' And the act further provides 'that if the auditor general and state treasurer, or either of them, is not satisfied with the appraisement and valuation so made and returned, they are hereby authorized and empowered to make a valuation thereof, based upon the facts contained in the report herein required or upon any information within their possession or that shall come into their possession, and to settle an account on the valuation so made by them for the taxes, penalties and interest due the commonwealth thereon.' And, while it is the capital
265 stock that is to be appraised, we have just seen that the title of the act declares that the property is to be taxed, and preamble 6 defined what is meant by 'capital stock' when it declared that the tax is to be imposed on 'their whole capital stock,' including as well their bonds, mortgages and moneys at interest, as their franchises and property of other kinds.'

"In settling accounts against various corporations for the first year after this act came into force, the auditor general construed the proviso that the actual value in cash was to be 'not less than the price or value indicated or measured by net earnings or by the amount of profit made and either declared in dividends or carried into surplus or sinking fund' to prescribe a hard and fast rule that the capital stock must be appraised at not less than a principal sum, six per cent. of which would equal the net earnings of the corporation for the tax year. And he settled accounts on that basis against a number of corporations, from which settlements they appealed to this court, where, on the trial of the cases, it was decided that this construction of the act was erroneous; that the net earnings constituted only one fact to be considered in determining the actual value of the capital stock, and that the amount and rate per cent. of dividends made and the amount accrued to surplus and sinking fund during the tax year do not furnish an absolute indication or measure of the actual value in cash of the capital stock of a corporation, but are to be considered with all other relevant facts in determining what is its actual value; that the prominent idea or thought of the whole act was to base taxation on the actual cash value; and

that this should be determined from facts, and not theories, on all cases except the one that this value should in no case be less than the average price at which the stock sold during the year.
266 Com. *v.* Edgerton Coal Co., 164 Pa. St. 284, 30 Atl. 125, 129. And in Commonwealth against Haney Transfer Co. (141, Jan. term 1895), decided by this court, and not reported, it was said, in the opinion of Judge McPherson, that the question of actual value in cash is a question of fact, which must be determined by considering the value of defendant's tangible property, the amount of its business, the rate of dividend declared, and the extent and value of its good will and franchises and privileges, as indicated by the evidence bearing upon those subjects at that particular time. In Com. *v.* Delaware, S. & S. R. R., 165 Pa. St. 44, 30 Atl. 522, 523, it was contended by the defendant that the franchises of a corporation were not to be included and appraised in estimating the value of its capital stock. But we decided that the franchise of the corporation was an element to be considered in ascertaining the value of capital stock; and it was said in the opinion of the supreme court, affirming this decision (page 54, 165 Pa. St., and page 523, 30 Atl.): 'In ascertaining the actual value of the capital stock, was it proper to take into consideration, as affecting that value, the franchises of the company? We think this question is affirmatively answered by the act of June 8, 1891, under which the valuation was made. The capital stock represents the franchises as well as other property of the company. In the sixth preamble of the act there appears a plain legislative purpose to include the franchise in fixing the value of the stock, and this is in harmony with the title and the provisions in respect to the taxation of it.'

"The able counsel for defendant lays great stress on the fact that, in the taxing acts and in the decisions of the courts construing them, it is the capital stock which is said to be taxed, but a care-
267 ful reading of the acts and the decisions will show that the words 'capital stock' are used as a convenient term to connect property, tangible and intangible, of the corporation. This is implied when it is said that a tax on the capital stock is a tax on the property and assets of the company; and when it is enacted that the tax shall be 'at a fixed rate of five mills upon each dollar of the actual value of their whole capital stock, including as well their bonds, mortgages and moneys at interest, as their franchises and property of other kinds;' and more definitely still when it is declared, in the act of 1891, 'that for the purpose of this act interests in limited partnerships or joint stock associations shall be deemed to be capital stock and taxable accordingly.' That is to say, as a matter of fact, a limited partnership has no 'capital stock,' in the common acceptation of the term, but every partner has a definite proportional interest in the assets of the company, and, for the purpose of taxation under this act, this interest 'shall be deemed to be capital stock and be taxable accordingly.' Clearly, then, when nominally the capital stock is taxed, it is in reality the property and assets of the company that are taxed, and the only way in which the value of the capital stock can be ascertained is by ascertaining the value of the property and assets. This illustrates the truth of the remark

made by Mr. Justice Paxson, already quoted, that 'the capital stock is nothing; a myth, a mere name, excepting in so far as it is represented by investments made with the money paid into the treasury of the corporation on account of such capital stock.' In a limited partnership it is literally nothing but a name apart from the assets, and in a corporation proper it is really nothing more, although we are accustomed to conceive of it as a separate entity.

268 "Counsel also argues that the form of the report required to be made by the act of 1891 does not call for a statement of the amount and value of the property and assets of the corporation, and, therefore, that it is not the property that is to be appraised. But, as we have seen, the value of the property must be ascertained whenever the tax is to be apportioned or a limited partnership is to be taxed, and, while it is true that the form of the report does not call for such definite information as to the actual value of the property and assets of the corporation as it might, the reason probably is that in the main it was copied from the prior acts without careful attention to the change.

"The conclusion that the value of incumbrances should not be deducted would seem to be greatly strengthened when the matter is examined in the light of the doctrines in Com. *v.* Fall Brook Coal Co., 156 Pa. St. 488, 26 Atl. 1071. It is there decided that the capital stock of the corporation, and the shares into which the capital is divided, are, at least for the purpose of taxation, identical, and that the shareholders are the real owners of the property and assets, which both the capital stock and the shares represent, and that they are the persons who are taxed when a tax is imposed upon either the capital stock or the shares. A corporation is (page 494, 156 Pa. St., and page 1071, 26 Atl.) said to be 'an artificial person created by law for the purpose of becoming the business representative, agent, or trustee of so many persons as may join to furnish the money with which the business to be done by the corporation may be carried on. * * * The money furnished by those whose representative it is to be is its capital stock. The amount that each person contributes to this fund is his share in the venture, and is called his 269 share or shares in the stock. The legal title to the whole sum so contributed is in the corporation, and so the legal title to all the property, real or personal, in which it may be invested. The equitable title—that is, the right to the profits from the business done, and to a return of the capital when the corporation is dissolved—is in the stockholders. * * * As in the ordinary case of trustee and *cestui que trust*, the real owners are the beneficiaries. The opinion in this case also states that the principle upon which it is proper to tax land without regard to the incumbrances upon it is that there is no community of interest between the owner of the land and the owner of the money borrowed and invested in the land, and that to tax both is not double taxation; that 'in that case there are two distinct subjects of taxation, each of which is made taxable by an express provision of the law. The farm is taxable as land, against whoever may be the owner, without regard to the incumbrances upon it. The sum secured by the mortgage

is taxable as money at interest, regardless of the use the borrower may make of it. If the owner of the land is compelled to incumber it, it may be his misfortune; but the man who lends money to him has no connection with him in title. There is in such case no double taxation. The land is taxed once to its owner. The money at interest is taxed once to its owner. They are distinctly different taxpayers, and pay taxes upon distinctly different subjects of taxation.

"We have, then, these principles: A tax on the capital stock of a corporation is a tax on its property and assets. The corporation is simply a trustee for its stockholders, and they are the real owners of the property, or, as expressed by the learned justice, it is 'the ordinary case of trustee and *cestui que trust*.' The beneficiaries
270 are the real owners. And whether the property is taxed in the name of the corporation or in the name of the shareholders, the ultimate burden falls upon the same persons. The fact that the tax is called a tax on capital stock is therefore not of the essence of the matter. Whatever called, it is a tax on the property and assets of the shareholders for whom the corporation is simply trustee. Neither is it vital that it is taxed in the name of the trustee. The shareholders are the real owners of the property taxed, and the tax is therefore a tax on their property. But, when the property of individuals is taxed, no reduction is made because the property is incumbered. It is therefore not easy to see why there should be any specific reduction made for individuals simply because their trustee is a corporation. As was said by Mr. Justice Miller, in State Railroad Tax Cases, 92 U. S., at page 605: 'Individuals do not escape taxation on their real and personal property because they are insolvent. * * * No state has ventured to establish the principle of permitting its visible tangible property to escape taxation, relying solely on a tax imposed on the individual on the basis of his estimated wealth in excess of his debts.' The consequence of establishing such a principle in Pennsylvania would be so serious that we cannot believe the legislature has ventured so to do. There are, as is well known, many railroad corporations in the state, which like the one in question in this case, were built at an extravagant cost, met chiefly by borrowed money, which are now insolvent, and whose net earnings are not sufficient to pay the interest on their sometimes enormous funded debt, yet they are valuable franchises which have been granted by the state, as well as tangible property,
which, for the uses to which it is applied, is worth in many
271 cases millions of dollars. All these, under the construction of the act of 1891 contended for on behalf of defendant, would entirely escape taxation by the state, and are not subject to local taxation, while the property of individuals who have no franchise from the state is taxed without regard to their insolvency. And the injustice and impolicy of such a construction is presented in a yet stronger light when we remember that in many cases—and notably in the one now before us—nearly all the funded debt secured by the incumbrances on the insolvent corporation's property is held by residents of other states or foreign countries; so that, if it is not taxable against the insolvent corporation, neither can it

be reached, in theory even, by taxing the evidences of indebtedness. The result would be that property within the borders of the state worth many millions of dollars would be entirely exempted from taxation.

"Conclusions of Law.

"(1) A tax on the capital stock of a corporation is a tax on its property and assets, including its franchises. The question of the actual value in cash of the capital stock is a question of fact, which must be determined by considering the value of defendant's tangible property, and assets of every kind, including its bonds, mortgages and money at interest, and its franchises and privileges; and the amount of the incumbrances on its property and franchises is also a relevant fact to be considered, but it is not to be specifically deducted from the valuation so ascertained and determined.

"(2) The commonwealth is entitled to recover from defendant in this case a tax at the rate of five mills on the dollar on the actual value in cash of 126.18–510.20 parts of the capital stock of 272 defendant amounting to.....with interest at the rate of twelve (12) per cent. from September 30, 1896, and attorney general's commission at the rate of five (5) per cent.

"(3) Judgment is therefore directed to be entered in favor of the commonwealth and against the defendant as follows:

Tax, five (5) mills on.....
Interest at twelve (12) per cent. per annum from October 1, 1896, to April 8, 1897
Attorney General's commissions, 5 per cent.....

Total .....

"

M. E. Olmsted, for appellant.

John P. Elkin, Dep. Atty. Gen., and Henry C. McCormick, Atty. Gen., for the Commonwealth.

DEAN, *J.:*

All the material facts of this case are stated in the opinion of the court below. The finding of a fact determines the amount of the judgment. The accounting officers of the commonwealth and the court adopt a like construction of the statute, but, differing in their views of the evidence, differ in results. The officers of the defendant corporation, putting a wholly different construction on the statute, largely differ from both as to the fact. The defendant appraised its capital stock as of no value whatever. The commonwealth appraises it at $34,480,577.70. The court below appraises it at less than half that amount. The main dispute between the commonwealth and defendant is as to the construction of the act of 1891. It may be conceded at once that the legislative intent to levy the higher amount must be express, or result from necessary implication; for, if in a tax law the intent is doubtful, it does not exist.

The title of the act declares the purpose to be to tax "all t
273 property of corporations, limited partnerships and joint st
associations having capital stock, at the rate of five mills
each dollar of its actual value." Could legislative language
plainer? All the property of corporations is to be taxed at the r
of five mills on each dollar of its actual value. The words "havi
capital stock" are used to distinguish such corporations from be
ficial, religious and other corporations having membership, but
capital stock representing the respective interests of members in
corporate property. Then, preamble 6 of the act further decla
it to be the purpose to tax "all corporations, limited partnerships a
joint stock associations having capital stock, at a fixed rate of f
mills upon each dollar of the actual value of their whole capi
stock, including as well their bonds, mortgages and moneys at
terest, as their franchises and property of other kinds. In Com.
Standard Oil Co., 101 Pa., St. 119, speaking by Paxson, *J.*, this co
held: "It has been repeatedly decided, and is settled law, that
tax upon the capital stock of a company is a tax upon its proper
and assets." Then in Appeal of Fox, 112 Pa., St. 354, 4 Atl., 1
it is said: "The capital stock is nothing—a myth; a mere nam
excepting in so far as it is represented by investments made with
money paid into the treasury of the corporation on account of su
capital stock. Hence it is that the courts have long since declar
that a tax upon the capital stock of a corporation is a tax upon t
assets and property of such corporation." In Com. *v.* Delaware, S.
S. R. Co., 165 Pa., St. 44; 30 Atl., 522, 523 (opinion by McCollu
J.), we said: "In ascertaining the actual value of the capital sto
was it proper to take into consideration, affecting the value, t
franchise of the company? We think this question
274 affirmatively answered by the act of June 8, 1891, und
which the valuation was made. The capital stock represe
the franchises as well as other property of the company. In t
sixth preamble of the act there appears a plain legislative purp
to include the franchises in fixing the value of the stock, and this
in harmony with the title and provisions in respect to the taxati
of it." There are other cases to the same effect. The statute havi
thus, in express terms, declared the subject of taxation to be all t
property of corporations having capital stock, and the settled int
pretation by this court of a tax on capital stock of a corporation
ing that it is a tax upon all the property of the corporation, it
clear the learned judge of the court below committed no error
the first sentence of his conclusion of law, thus: "A tax on the capit
stock of a corporation is a tax on its property and assets, includi
its franchises."

The main contention, however, is over the last part of the co
clusions, as follows: "The question of the actual value in cash of t
capital stock is a question of fact, which must be determined
considering the value of the defendant's tangible property and ass
of every kind, including its bonds, mortgages and moneys at intere
and its franchises and privileges, and the amount of the incu
brances on its property and franchises is also a relevant fact to

considered, but it is not to be specifically deducted from the valuation so ascertained and determined." The contention of the appellant's counsel in substance is that, to ascertain the actual value, there should be deducted the amount of the corporation indebtedness from the aggregate fairly appraised value of the corporate property. The remainder would then represent the actual value of the capital stock.

This would in many cases hide the tangible property, and
275 turn the commonwealth over to the assessment and collection of its revenues from nothing; in the face, too, of what we have repeatedly decided—that a tax upon the capital stock of a company is a tax upon its property and assets. The legislature might have so worded the statute that such result as that contended for would follow, namely, that solvent corporations should pay taxes, and insolvent ones not; but, with our decisions in 1882 and 1886, and the declared law long preceding them, that "capital stock" in taxing statutes, meant the property and assets of the corporation, before them they declared, in the act of 1891, precisely to the contrary. In fact, from the wording of preamble 6 of the act of 1891, we do not doubt that, at least, the framer of the act was familiar with the opinion of this court in Com. *vs.* Standard Oil Co., *supra*.

In supporting their arguments on each side, counsel have given undue significance to the indebtedness of the corporation. Strictly speaking, in view of the purpose of this statute, the debt is almost as much of a myth as the certificate of capital stock. The declared purpose is to tax the capital stock by ascertaining its value in view of the tangible assets of corporations, what was owing to them, the value of their franchises, and the rights and privileges they possessed under their grants. The commonwealth no more sought, by the act of 1891, to ascertain and tax the net assets of these artificial beings, than, by the usual tax laws, she seeks to tax the net assets of natural ones. In the latter case she rarely inquires as to what the taxpayer owes. She does ask what he is possessed of. It is only when the attempt is made to tax his creditor that, incidentally, what is owing by the debtor becomes of interest to the taxing power. We

have no hesitation in holding that it would be manifest
276 error to adopt the amount of the debt as a part of the value of the corporate property; and it would be just as erroneous to hold that it should be deducted from the aggregate value of the property, and thereby withdraw tangible property to that extent from taxation. In either case it would be dragging in a fact of but slight consequence, and making it the prominent and controlling one in the issue, in the face of the declared purpose of the statute to tax the actual value of the capital stock, as indicated by the franchise and property. In the case of Com. *v.* Standard Oil Co., *supra*, Paxson, *J.*, in referring to the fact that the certificates of stock were in possession of the owner in Ohio, where the corporation was domiciled, says: "It follows, necessarily, that shares of stock in a Pennsylvania corporation, held by a corporation or individual domiciled in another state, cannot be taxed here. One sufficient reason is that there is nothing here to tax. The capital stock—that is, the property and assets—are here, and are taxed." In other words,

the shares themselves, which represent the owner's interest less debts, have so little to do with the subject of taxation—the capital stock—that it is immaterial where they are held, or who holds them. The property and assets—the capital stock—being in this state, that, alone, is within reach of the taxing power. Now, what change is worked in this tangible property by subjecting it to a debt of the owner? In the case cited, the certificates and owner were both in a foreign jurisdiction; yet, the property and franchise being within the jurisdiction, the authority of the commonwealth to tax the capital stock, on ascertaining its value from what was within the jurisdiction, was upheld. If he cannot withdraw his tangible
277 property from taxation, by taking his title to it, and person, outside state boundaries, how can he do so by voluntarily pledging it for a debt? That the owner subjects it to a debt in no way changes the relation of the commonwealth to it as a subject of taxation. It constitutes precisely the same capital stock as before. His relation to his own property has been somewhat changed, for, by the mortgage debt, he has admitted others to a share of the income, and has given them a lien for their debt. His title, however, remains just the same as if the owner of the legal title to land had placed a mortgage upon it. All the indications of ownership, the possession of the deed, and dominion over the property, continue, as if no debt had been created. As is said by our Brother Williams in Com. *v.* Fall Brook Coal Co., 156 Pa., St. 488, 26 Atl. 1071, speaking of the power of the commonwealth to tax the land as well as the mortgage upon it: "In that case there are two distinct subjects of taxation, each of which is made taxable by an express provision of the law. The farm is taxable as land, against whomsoever may be the owner, without regard to the incumbrances upon it. * * * The land is taxable once to the owner. The money is taxed once to its owner. They are distinctly different taxpayers, and pay taxes upon distinctly different subjects of taxation." The debt as an item of evidence, may have bearing in fixing the value of the franchise; but from the nature of the property, and the character of the debt, its affirmative weight in establishing value is insignificant: for of all forms of debt, as an indication of actual value of the thing pledged, the ordinary railroad mortgage is the most unreliable, and especially is this the case when the mortgage is executed to carry out a reorganization plan of security holders in a bank-
278 rupt road. Without adverting further to the history of this road it is sufficient to say that its mortgage debt is always far in excess of any possible value of the property. We do not know just what prominence was given by the learned Judge of the court below to the amount of indebtedness in reducing the actual value of the capital stock. He says, in the conclusion of law already quoted, that the question of actual value in cash of the capital stock is one of fact, to be determined by considering the value of defendant's tangible property, etc. "And the amount of incumbrances on its property and franchises is also a relevant fact to be considered, but it is not to be specifically deducted from the valuation so ascertained and determined." That he gave no weight whatever to it, even as

affirmative evidence tending to establish the value of the stock as claimed by the commonwealth, is clear. That he treated it as a relevant fact favoring defendant, and tending to reduce the actual value, although not to be specifically deducted, is also clear; and in this he was correct. That a large debt, one largely out of proportion to the value of the property, secured by mortgage, with interest payable semi-annually, constituting what is called a "fixed charge," seriously depreciates the actual value of the property, cannot be questioned. Default in any payment of interest puts the property in peril of seizure and sale to satisfy not only the overdue interest, but the whole debt. A property heavily incumbered, as is this one, is liable to pass into the hands of the mortgage creditors at any time. But counsel for defendant planted himself on a demand for an absolute deduction of the whole amount from the appraised value, and made no request for a specific finding of fact in this particular. It was not, therefore, incumbent on the court to specify in the
279 finding exactly what weight was given to a particular fact; and we assume that it had all the effect that it was entitled to.

The argument that different methods were adopted by the commonwealth's officers in ascertaining the actual value of the capital stock of corporations, and therefore, there has been want of uniformity and a discrimination, is not well founded. As the learned Judge of the court below shows, prior to the act of 1891 the basis of taxation value, by the taxing acts, was the net earnings; but the latter act declares that the capital stock shall be appraised "at its actual value in cash, not less, however, than the average price which said stock sold for during said year, and not less than the price or value indicated or measured by net earnings, or by the amount of profit made, and either declared in dividends or carried into surplus or sinking fund." A minimum appraisement is here fixed for solvent corporations. In most cases, doubtless, the corporation officers and the commonwealth, in estimating the actual value of a sol-ent, well-managed road, would adopt it—and properly, too—as a fair basis in estimating the actual value of the capital stock. But the act of 1891 was intended to reach also the bankrupt road, which may have the same mileage, the same traffic, and the same privileges as the solvent one. The state conferred upon it the right of eminent domain, for location and extension of branches or feeders, as well as for necessary improvements. Being constructed, it now has the right, under the protection of the laws, to operate it in carrying freight and passengers. As the same rule for a fair estimate of the actual value of the capital stock cannot be adopted as in case of the solvent roads, and the commonwealth's officers being dissatisfied with the corpo-
280 rate officers' appraisement, they proceed, under the authority expressly given, to make an appraisement, upon the facts in the report, and other information within their possession. Upon appeal, the court differs from them in their inferences, and reduces largely the amount subject to tax. On the number of miles of road in Pennsylvania—about 127 of a total of 430—with a capital stock of the actual value, as a whole of $15,000,000, the court fixes the actual value of the capital stock of the 127 miles in this state at only

a little over $3,500,000. The method of determining the proportion of stock taxable in Pennsylvania has been repeatedly decided to be the correct one. The figures, certainly, do not indicate an excessive valuation of the capital stock of 127 miles of railroad. As between the defendant and solvent roads of the same physical character, there is no discrimination as concerns results, in favor of the solvent ones; for the latter are rated as high as $40 to $52 per share, while this one is less than one-third that amount. The actual value being a pure question of fact, appellant has no standing to complain of discrimination in methods, so long as its stock is not assessed in excess of that value. It may be that the Reading and some other corporations are taxed on less than the actual value of their capital stock. If so, the commonwealth is not here appealing, and consequently it is not our business to inquire into the matter. We can only say that, after a most careful examination of the whole case, we find neither error of fact nor law in the judgment of the court below, and it is therefore affirmed.

MITCHELL, *J.*:

I dissent in this and kindred cases, known as the "Capital Stock Cases," because I am of opinion that the decision is founded on a fundamental error, in confusing a tax on the property of
281 the corporation with the tax on the property of the individual shareholder therein, which is what the statute imposes. The subject matter of taxation under the act of June 8, 1891, is capital stock, *eo nomine*, independently and without reference to the property which it represents. It is to be taxed at its "actual value in cash, not less however than the average price which said stock sold for during said year," etc. The officers of the corporation concerned are required to make sworn returns under seventeen specific heads, all of which tend to show the value of the stock as such, and not a single one of which refers directly or indirectly to the value of the property which such stock represents. The value of the capital stock in the hands of the shareholders is the value of their resulting interest in the property of the corporation subject to its debts and incumbrances, in view of the use to which it may be put under its corporate franchises, etc.; and the value of such resulting interest is the true subject of tax under the statute. As construed by this decision, the tax is put on the value of the property of the corporation, without regard to the value of the capital stock in the hands of the shareholders. This is a total change in the subject of taxation, without any warrant in the statute, and against its plain language and intent.

Green and Williams, JJ., join in this dissent.

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Exhibit G.

New York Central & Hudson River Railroad Co.

New York, 6–5–1905.

Dear Sir: Below please find movements of N. Y. C. Car number 90350 from Weehawken to San Francisco.

C. H. Ewings,
Car Acc't.

Movements.	Date. Month.	Day.	Year.	L. or E. Time.	Train.	Con.
Rec'd from				M.	Mo. Pacific.	
From W'kn.	3	2	04	M.	C. R. I. & P.	
To Susp. Bridge	3	4		M.	Mo. Pac. 7–2	
To M. C.	3	4		MM.	C. B. & Q. 7–11	
To Chicago Belt	3	8		M.	C. G. W. 7–11	
To C. G. W.	3	9		M.	Wabash 7–12	
To K. C. C. B.	3	13		M.	M. C. 7–23	
To C. B. Q. & Mo. Pac.	3	13		M.	N. Y. C. 7–31	
To D. & R. G.	3	17		M.		
To R. G. W.	3	18		M.		
To So. Pacific	3	19		M.		
To R. G. W.	4	10		M.		
To D. & R. G.	4	16		M.		
To Mo. Pac.	5	2		M.		
To D. & R. G.	5	3		M.		
Del'd to Mo. Pac.	5	19				

New York Central & Hudson River Railroad Co.

New York, 6–5–1905.

Dear Sir: Below please find movements of N. Y. C. Car number 63379 from Weehawken to Minneapolis.

C. H. Ewings,
Car Acc't.

Movements.	Date. Month.	Day.	Year.	L. or E. Time.	Train.	Con.
Rec'd from				M.	To Erie 4–27	
From W'kn.	3	11	04	M.	N.Y.C.&St.L 5–18	
To Susp. Bridge	3	14		M.		
To Wabash	3	14		M.		
To C. Belt	3	18		M.		
To Wisc. Cent.	"	"		M.		
To Gt. North.	3	22		M.		
To C. St. P. M. & O.	3	23		M.		
To Gt. North.	3	25		M.		
To Wisc. Cent.	3	28		M.		
To Gt. North.	3	28		M.		
To M. & W.	3	29		M.		
To Gt. North.	—			M.		
To Wisc. Cent.	3	31		M.		
To E. J. & E.	4	3		M.		
Del'd to N. Y. C. & St. L.	4	14				

283 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6–5–1905.

DEAR SIR: Below please find movements of N. Y. C. Car number 11645 from Weehawken to Victoria, B. C.

C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from				M—To Erie	6		22
From W'kn.	3	12	04	M—P. & L. E.	6		33
To Ogdensburgh ...	3	15		M—Erie	7		3
To C. P.	3	15		M—L. S. & M. S.			
To N. Y. C.	4	1		M—C. M. & St. P.	7		13
To C. North.	4	26		M—L. S. & M. S.	7		21
To M. C.	4	26		M—C. R. & I. P.	7		24
To W. & L. E.	5	3		M—C. T. Transfer	7		35
To C. H. & D.	5	3		M—C. R. & I.	8		33
To C. & O.	5	6		M—L. S. & M. S.			
To C. H. & D.	5	27		M—P. R. R.	8		8
To L. E. & W.	6	11		M—L. S. & M. S.	8		29
To L. S. & M. S. ...	6	15		M			
To L. E. & W.	6	16		M			
To L. S. & M. S. ...	6	16					
Del'd to							

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6–5–1905.

DEAR SIR: Below please find movements of N. Y. C. Car number 46260 from Weehawken to Medicine Lodge, Kas.

C. H. EWING, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from					M		
From W'kn.	3	15	04		M		
To Susp. Bridge	3	20			M		
To Wabash	3	21			M		
To C. Belt	3	24			M		
To A. T. & S. F.	3	24			M		
To M. C.	3	26			M		
To Chic. Junct.	3	26			M		
To Wabash	3	27			M		
To Chic. Jct.	3	29			M		
To Mich. Cent.	3	29			M		
To N. Y. C.	4	5			M		
To					M		
From					M		
To					M		
Del'd					M		

284 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6–5–1905.

DEAR SIR: Below please find movements of N. Y. C. Car numbered 64397 from Weehawken to Hamilton, Ont.

C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E. TIME.	TRAIN.	CON.
Rec'd from				M. L. S. & M. S.		
From W'kn.	3	17	04	M. C. N. W.	6	14
To Ogdensburgh	3	21		M. L. S. & M. S.	6	21
To C. P.	3	21		M. E. J. & E.	6	23
To D. S. S. & A.	3	25		M. L. S. & M. S.	6	29
To M. C.	5	3		M. L. V.	7	2
To G. T.	5	12		M. W. & N. B.	7	5
To M. C.	5	17		M. P. & R.	7	16
To L. S. & M. S.	5	22		M. N. Y. C.	7	18
To M. C.	5	23		M.		
To L. S. & M. S.	5	27		M.		
To M. C.	5	27		M.		
To L. S. & M. S.	5	28		M.		
To Erie	6	1		M.		
To P. & L. E.	6	2		M.		
Del'd to Erie	6	10				

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6–5–1905.

DEAR SIR: Below please find movements of N. Y. C. Car number 24241 from Weehawken to Winnipeg.

C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from					M		
From W'kn.	3	18	04		M		
To Ogdensburgh	3	22			M		
To C. P.	3	25			M		
To N. Y. C.	4	5			M		
From					M		
To					M		
From					M		
To					M		
From					M		
To					M		
From					M		
To					M		
From					M		
To					M		
Del'd to							

285 NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6–5–1905.

DEAR SIR: Below please find movements of N. Y. C. Car number 64887 from Weehawken to Minneapolis.

C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from					M		
From W'kn.	3	21	04		M		
To Ogdensburgh	3	25			M		
To C. P.	3	26			M		
To N. Y. C.	4	11			M		
From					M		
To					M		
From					M		
To					M		
From					M		
To					M		
From					M		
To					M		
From					M		
To					M		
Del'd to							

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.

NEW YORK, 6–5–1905.

DEAR SIR: Below please find movements of N. Y. C. Car number 65224 from Weehawken to Duluth.

C. H. EWINGS, Car Acc't.

MOVEMENTS.	DATE. MONTH.	DAY.	YEAR.	L. OR E.	TIME.	TRAIN.	CON.
Rec'd from					M		
From W'kn.	3	27	04		M		
To Ogdensburgh	3	31			M		
To C. P.	4	2			M		
To Hull Electric Co.	4	9			M		
To C. P.	4	2			M		
To N. Y. C.	4	22			M		
From					M		
To					M		
From					M		
To					M		
From					M		
To					M		
From					M		
To					M		
Del'd to							

286 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK, upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Relator,

against

OTTO KELSEY, as Comptroller of the State of New York, Respondent.

Stipulation under Sections 3301 *and* 1353 *of the Code of Civil Procedure.*

It is hereby stipulated, under Section 3301 of the Code of Civil Procedure, that the foregoing are true copies of the petition for writ of certiorari, order of issuance of writ, writ, and return to writ, and certification thereof, as required by Section 1353 of the Code of Civil Procedure, is hereby waived.

Dated New York, October 21, 1905.

IRA A. PLACE,
Attorney for Relator.

JULIUS M. MAYER,
Attorney-General,
Attorney for Respondent.

287 *Order of Appellate Division.*

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department of said State, at the Appellate Division Court Room, in the City of Albany, commencing on the 14th day of November, 1905.

Present: Hon. Charles E. Parker, Presiding Justice. Walter Lloyd Smith, Emory A. Chase, Alden Chester, John M. Kellogg, Associate Justices.

THE PEOPLE OF THE STATE OF NEW YORK, upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Relator,

vs.

OTTO KELSEY, as Comptroller of the State of New York, Respondent.

Tax of 1904.

This case having been brought on for hearing and argument upon the writ of certiorari and return and the papers upon which the writ was granted and having been submitted on printed brief and argu-
288 ment by Ira A. Place, Esq., of counsel for the relator, and by Horace McGuire, Esq., Deputy Attorney General, of counsel for the respondent.

Now, on motion of Julius M. Mayer, Attorney General, attorney for the respondent,

It is ordered that the determination of the Comptroller be and the same hereby is unanimously confirmed, with fifty dollars costs and disbursements.

JOSEPH H. HOLLANDS, *Clerk.*

[L. S.] A copy.
JOSEPH H. HOLLANDS.

SIR: Take notice, that the within is a copy of an order duly filed and entered in the office of the Clerk of Albany County on the 5th day of December, 1905.

Yours, etc.,

JULIUS M. MAYER,
Attorney General, Attorney for Respondent.

To Ira A. Place, Attorney for Relator.

289 *Affidavit of No Opinion.*

Supreme Court, Appellate Division—Third Department.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Relator,

against

OTTO KELSEY, as Comptroller of the State of New York, Respondent.

Tax of 1904.

STATE AND COUNTY OF NEW YORK, *ss.:*

Thomas Emery, being duly sworn, says: That he is an attorney and counselor at law, and associate counsel for the relator The New York Central and Hudson River Railroad Company in the above-entitled action.

That no opinion was handed down by the Appellate Division herein.

THOMAS EMERY.

Sworn to before me this 6th day of December, 1905.

GEO. T. BROWN,
Notary Public, Westchester County.

Certificate filed in New York County.

290 *Relator's Notice of Appeal to Court of Appeals.*

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Relator,

against

OTTO KELSEY, as Comptroller of the State of New York, Respondent.

Notice of Appeal to Court of Appeals.

Tax of 1904.

SIRS: Please take notice that the relator in the above-entitled action hereby appeals to the Court of Appeals from the order of the Appellate Division of the Supreme Court, Third Department, entered herein in the office of the Clerk of the County of Albany, on the 5th day of December, 1905, and from each and every part of said order

Dated New York, December 5th, 1905.

Yours, &c.,
IRA A. PLACE,
Attorney for Relator, Room 417 Grand Central Station, Borough of Manhattan, New York City, N. Y.

To Julius M. Mayer, Esq., Attorney for Respondent, Capitol, Albany, N. Y., and Clerk of the County of Albany, Albany, N. Y.

291 *Stipulation.*

In the Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant,

against

OTTO KELSEY, as Comptroller of the State of New York, Respondent.

Stipulation Under Sections 3301 *and* 1353 *of the Code of Civil Procedure.*

Tax of 1904.

It is hereby stipulated, under Section 3301 of the Code of Civil Procedure, that the foregoing are true copies of the notice of appeal, the order appealed from and the papers upon which the Court below acted in making said order, on file in the office of the Clerk of Albany County, and certification thereof, as required by Section 1353 of the Code of Civil Procedure, is hereby waived.

Dated Borough of Manhattan, New York City, December 6th, 1905.

IRA A. PLACE,
Attorney for Appellant.
JULIUS M. MAYER,
Attorney-General, Attorney for Respondent.

292 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, held at the capitol in the city of Albany, on the 23rd day of January, in the year of our Lord one thousand nine hundred and six before the judges of the said court.

Witness the Honorable Edgar M. Cullen, chief judge presiding.
W. H. SHANKLAND, *Clerk.*

Amended Remittitur, January 31st, 1906.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant,

against

OTTO KELSEY, as Comptroller of the State of New York, Respondent.

Tax of 1904.

Be it remembered, that on the 15th day of December in the year of our Lord one thousand nine hundred and five, The New York Central and Hudson River Railroad Company, the appellant in this proceeding, came here into the Court of Appeals, by Ira A. Place, its attorney, and filed in the said court a notice of appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department, and Otto Kelsey, as Comptroller of the State of New York, the respondent in said proceeding, afterwards appeared in said Court of Appeals, by Julius M. Mayer, Attorney-General and attorney for said respondent, which said notice of appeal and the return thereto filed as aforesaid, are hereunto annexed.

293 Whereupon the said cause having been submitted to the said Court of Appeals upon the printed briefs of counsel on behalf of the said respective parties, and after due deliberation thereon, the court did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from in this proceeding be and the same hereby is in all things affirmed with costs. The relator having contended herein that the statute if it purport to authorize the said tax, and the authority exercised under the Statute in and by the imposition and exaction of the said tax are and each thereof is violative of the Constitution of the United States in the several particulars following; the court hold and adjudge that the statute under and in pursuance of which the tax herein complained of is imposed and exacted does not, and the authority exercised under this Statute in and by the imposition and exaction of the said tax does not, (1) offend against the commerce clause Article 1 Section 8 of the Constitution of the United States; (2) nor contravene the provisions of Article 1 Section 10 thereof forbidding impairment of the obligations of contracts; (3) nor offend against Article 4 Section 1

thereof requiring that full faith and credit shall be given in each State to the public acts of every other State; (4) nor offend against the provisions of the fourteenth amendment thereof forbidding the State to deprive any person of property without due process of law, and forbidding the State to deny to any person within its jurisdiction the equal protection of the laws.

And it was further ordered that the record aforesaid and the proceedings in this court be remitted to the said Supreme Court, there to be proceeded upon according to law.

Whereupon it is considered that the said order be in all things affirmed with costs as aforesaid and stand in full force strength and effect.

294 And hereupon as well the notice of appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the justices thereof &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office.

ALBANY, *January* 31*st*, 1906.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said proceeding in the Court of Appeals, with the papers originally filed therein and attached thereto.

[Seal Court of Appeals State of New York.]

W. H. SHANKLAND, *Clerk.*

295 *Memorandum.*

Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant,

vs.

OTTO KELSEY, as Comptroller of the State of New York, Respondent.

Argued January 9th, 1906; decided January 23, 1906.

Ira A. Place, for appellant.
Horace McGuire, Deputy Atty. General, for respondent.

Three appeals from determinations of the Appellate Division, third department, which unanimously affirmed the determinations

of the Comptroller of the State of New York in assessing the relator for its annual franchise tax for the years 1902, 1903 and 1904.

The orders in all three cases affirmed, with costs.

No opinion.

Concur: Cullen, Ch. J., O'Brien, Haight, Vann, Werner, Willard Bartlett and Hiscock, JJ.

296 [Endorsed:] In the Court of Appeals of the State of New York. The People of the State of New York, Upon the Relation of The New York Central and Hudson River Railroad Company, Appellant, *vs.* Otto Kelsey, as Comptroller of the State of New York, Respondent. Memorandum. Tax of 1904.

297 *Assignment of Errors.*

In the Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK, Upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Plaintiff in Error,

against

OTTO KELSEY, as Comptroller of the State of New York, Defendant in Error.

(Tax of 1904.)

To the Honorable Justices of the Supreme Court of the United States:

Come now the said petitioners, plaintiffs in error, and respectfully show to the Court that there is in the said record and proceedings manifest error upon which they will rely in and for their prosecution of the writ of error in the above entitled cause, to wit:

I. That the said Supreme Court of the State of New York erred in rendering, and the said Court of Appeals of the State of New York erred in affirming the final order and judgment wherein and whereby the provisions of section 182 of the Tax Law of the State of New York, and the authority exercised thereunder by the Comptroller of the State of New York, were held valid in and for franchise taxation of and upon the basis of the capital of the said relator invested and employed in the average number of its passenger, freight, mail, baggage and express cars which were in obedience to laws of the United States and in due course of business delivered by relator to and employed and used by other common carrier railroad cor-
298 porations outside of the State of New York in the through carriage of persons and property starting or consigned from the State of New York, Massachusetts, New Jersey and Pennsylvania, respectively, and destined to other states, and vice versa, and in transportation of persons and property between points in respective states other than and over routes wholly outside of the State of New York, and that such franchise tax did not offend against the commerce clause, Article 1, Section 8 of the Constitution of the United States.

II. That the said Courts, respectively, erred in holding and deciding the said statute valid authority of and for franchise taxation upon the basis of the capital of the said relator invested and employed in the average number of its passenger, freight, baggage, mail and express cars, which in obedience to the requirements of the United States statutes, and in the due process of business were transferred and surrendered by said relator to the possession of and used successively and interchangeably by other common carrier railroad corporations outside of the State of New York in the through carrying of persons and property between points in respective states other than New York State, and over routes outside of that state, all under authority of and in the exercise of franchises granted to them respectively by respective states other than the State of New York, and that the franchise tax thus computed and imposed did not impair the obligations of the contracts, arising upon, inhering in and pertaining to the grant, acceptance and use of the respective franchises whereunder the said cars of relator were thus operated and used outside of the State of New York by common carrier railroad corporations foreign to said
299 State of New York, and hence was not repugnant to Article 1, Section 10 of the Constitution of the United States.

III. That the said Courts, respectively, erred in holding and deciding the said statute valid authority of and for franchise taxation upon the basis of the capital of the said relator invested and employed in the average number of its passenger, freight, baggage, mail and express cars, which in the course of transportation business and in obedience to the requirements of the United States statutes, were by the said relator delivered to corporations foreign to the State of New York, and by such foreign corporations employed and used upon railroads operated by them respectively, in respective states other than New York State in the through carrying of persons and property starting or consigned from points in New York, Massachusetts, New Jersey or Pennsylvania, respectively, and destined to points outside of such respective state, and vice versa, and between points foreign to said several states via and over lines of railroad situate without the State of New York, all in the exercise of and under the authority of franchises granted by the respective states wherein the said operations were so carried on and conducted, and that such franchise tax did not impair the obligations of the contracts pertaining to such use of relator's cars by other corporations, and hence was not repugnant to Article 1, Section 10 of the Constitution of the United States.

IV. That the said Courts, respectively, erred in holding and deciding the said statute valid authority of and for and the exercise thereunder of said authority the valid imposition of franchise taxation in and by the State of New York upon the basis of the capital of relator invested and employed in the average number of
300 its cars which, in obedience to the requirements of the statutes of the United States, were delivered by relator to transportation corporations foreign to the State of New York, and operated and used by them wholly within states other than New York State, under authority of, and in the exercise of franchises granted by such other

states, respectively, to corporations created by them, and that the said statute and the said tax imposed under its authority, did not operate to deprive relator of its property or property rights without due process of law, and did not deprive relator of the equal protection of the laws and hence did not contravene the provisions of the fourteenth amendment to the Constitution of the United States.

V. That the said Courts, respectively, erred in holding and deciding that franchise taxation prescribed by, and imposed by the said Comptroller of the State of New York under the supposed authority of said statute, upon the basis of relator's capital invested in the average number of its cars by it operated and used in the States of Massachusetts, New Jersey and Pennsylvania, respectively, in the transportation of persons and property between points within either of the said respective states, and between points within and points without such respective State, and between points of starting or shipment and points of destination without and via and over routes in part within one or more of the said respective states, all under authority of and in the exercise of franchises granted by those states, respectively, to corporations created thereby and domiciled therein, and by the latter leased to the said relator, all subject unto the regulation of and under the authority and protection of the public acts of such respective state, did not burden or regulate interstate or foreign commerce, and hence did not offend against or contravene the provisions of
301 the commerce clause, Article 1, Section 8 of the Constitution of the United States; did not impair the obligations of contracts arising upon or inhering such obedience to the commerce laws of the United States, and therein did not contravene Article 1, Section 10 of the Constitution of the United States; and did not deny or refuse full faith and credit to the public acts of such other state and therein did not contravene Article 4, Section 1 of the Constitution of the United States.

VI. That the said Courts, respectively, erred in holding and deciding the said statute valid authority of and for franchise taxation in and by the State of New York upon the basis of the capital of relator invested and employed in the average number of its cars operated and used by it in the States of Massachusetts, New Jersey and Pennsylvania in the exercise of franchises granted by those states, respectively, and leased or remised by the grantees thereof to the said relator, and exercised by it in the carrying of commerce between points respectively within, and between points within and points without those respective states, and that therein and thereby the said statute did not impose burden upon or regulation of interstate and foreign commerce and did not impair the obligations of contracts pertaining to interstate and foreign commerce, and hence did not offend against the provisions of either Article 1, Section 8, or Article 1, Section 10 of the Constitution of the United States.

VII. That the said Court, respectively, erred in holding and deciding that franchise taxation imposed by the said Comptroller of the State of New York under the supposed authority of said statute, upon the basis of the capital of said relator invested
302 in the average number of its cars by it operated and used in the States of Massachusetts, New Jersey and Pennsylvania,

respectively in the exercise of franchises granted by those states, respectively, to corporations created thereby and domiciled therein, and by them leased to relator and by it exercised in commerce local to said respective states, as also in commerce between those respective states and other states, did not impair the obligations of the contracts inhering in, arising upon and pertaining to the grant, acceptance and use of the franchises granted by the said respective states, within their domain, respectively, and hence did not therein offend against the provisions of Article 1, Section 10 of the Constitution of the United States.

VIII. That the said Courts, respectively, erred in holding and deciding the said statute valid authority of and for franchise taxation upon the basis of the capital of the said relator invested and employed in the average number of its cars used wholly outside of the State of New York, in the operation of railroads situate in other states, owned by corporations created by and domiciled within such other respective states, and leased to and operated by the said relator under authority of the franchises of its said respective lessors, granted to them by the said states, respectively, and that such franchise tax did not impair the obligations of the said contracts of lease, and hence was not therein repugnant to Article 1, Section 10 of the Constitution of the United States.

IX. That the said Courts, respectively, erred in holding and deciding the said statute valid authority of and for and the exercise thereunder of said authority the valid imposition of franchise taxation upon the basis of the capital of the said relator invested and employed in the average number of its passenger, freight,
303 baggage, mail and express cars employed and used by relator in the States of Massachusetts, New Jersey and Pennsylvania, respectively, upon lines of railroad situate in and built and owned by corporations chartered by and domiciled in said respective states, and leased by such corporations to and operated by the said relator, in the carrying of state and interstate commerce under and subject unto the franchise granted and regulation prescribed by such respective state wherein the said road is situate, and that such franchise tax did not transcend the territory and power of the jurisdiction of the State of New York and of its said Comptroller and did not deprive relator of its property or property rights without due process of law, and did not deny to relator the equal protection of the laws, and hence did not therein contravene the fourteenth amendment of the Constitution of the United States.

X. That the said Courts, respectively, erred in holding and deciding the said statute of the State of New York to be valid authority for, and the said authority of the Comptroller of the State of New York exercised thereunder to constitute valid imposition of, the said franchise tax imposed and computed upon the basis of the capital of the said relator invested and employed in the average number of its cars, which, having in obedience to the requirements of the laws of the United States passed out of the State of New York and out of the possession, custody and control of the said relator, were operated and used by railroad corporations created by other states upon their railroads there situate, under authority of franchises granted by such

other states, respectively, in common carrier transportation local to said respective states and between those and other states, and that such franchise tax thus computed and imposed did not con-
304 stitute a burden upon or regulation of commerce among the several states, and did not impair the obligations of the contracts under which in obedience to the laws of the United States the said relator transferred and surrendered, and the said respective foreign corporations in turn directly or remotely acquired possession and custody of and used the said cars of said relator, and did not impair the obligations of the contracts inhering in, arising upon and incident to the grant, acceptance and use in such other states of the franchises granted by them, respectively, and did not derogate from the dignity of such other respective states or refuse full faith and credit to the public acts thereof, or otherwise transcend the territory or power of the jurisdiction of the State of New York or of its said Comptroller, and hence that the said franchise tax thus computed and imposed did not offend against and was not violative of or repugnant to either Article 1, Section 8, or Article 1, Section 10, Article 4, Section 1, or the fourteenth amendment of the Constitution of the United States.

XI. That the said Courts, respectively, erred in holding and deciding the said statute of the State of New York to be valid authority for, and the said authority of the Comptroller of the State of New York exercised thereunder to constitute valid imposition of the said franchise tax computed and imposed upon the basis of the capital of the said relator invested and employed in the average number of its cars operated and used in the States of Massachusetts, New Jersey and Pennsylvania, respectively, upon lines of railroad situate therein, built, maintained and operated under authority of franchises granted by those respective states to and accepted by corporations created thereby, and domiciled therein, and under leases or grants of trackage rights of railroad and accompanying
305 franchise demised or let by the said owning corporations to the said relator, and thus operated and used in and about common carrier transportation local to the said states of Massachusetts, New Jersey and Pennsylvania, respectively, and between those respective states and other states of the United States and dominions foreign to the United States, and that such franchise tax thus computed and imposed did not constitute a burden upon or regulation of commerce among the several states or foreign commerce, or commerce within and domestic to such respective state, and did not impair the obligations of the contracts inhering in, arising upon and incident to the grant, acceptance and use in such respective States of Massachusetts, New Jersey and Pennsylvania of the franchises granted by them respectively, or of the contracts of lease and agreements of and for trackage rights whereby and whereunder the said owning corporations granted, demised and let the said property and property rights and franchises to relator and relator thus operated in the said respective states under authority thereof and of said franchises, and did not derogate from the dignity of such respective state or deny or refuse full faith and credit to the public

acts of such other respective state, or thus or otherwise transcend the territory or power of the jurisdiction of the State of New York or of its said Comptroller, and hence that the said franchise tax thus computed and imposed did not contravene or offend against and was not violative of or repugnant to either Article 1, Section 8, or Article 1, Section 10, Article 4, Section 1, or the fourteenth amendment of the Constitution of the United States.

XII. That the said Courts, respectively, erred in so holding and deciding as therein and thereby to uphold and sustain the
306 validity of the said statutory provisions and of the authority of the said Comptroller of the State of New York exercised thereunder in the said computation and imposition of the said franchise tax as not constituting a burden upon or regulation of commerce domestic to and within states other than the State of New York, as not constituting a burden upon or regulation of commerce among the several states or with foreign countries, as not impairing the obligations of contracts arising upon and pertaining to commerce within and domestic to states other than the State of New York, as not impairing the obligations of contracts arising upon or pertaining to commerce among the several states and with foreign countries, as not impairing the obligations of contracts arising upon and pertaining to the grant and acceptance and lease of franchises by and the exercise and use thereof within states other than the State of New York, as not derogatory to the dignity of a sister state, as not denying full faith and credit to the public acts of such other state, as not transcending the territory or power of the jurisdiction of the State of New York or of its said Comptroller, and as not depriving the said relator of its property or property rights without due process of law, and as not depriving relator of the equal protection of the laws, and hence denying to the said relator the relief, order and decree herein prayed for, and in rendering judgment against them for costs and disbursements in the said cause and proceeding.

XIII. That the said Courts, respectively, erred in holding and deciding in favor of the validity of the said statute of the State of New York, and the authority of the said Comptroller of the State
307 of New York by him exercised thereunder, and consequent thereupon that the said petitioners, plaintiffs in error, were disentitled to have and maintain their said cause and proceeding and to have the relief, order and decree therein and thereby prayed for.

XIV. That the said Courts, respectively, erred in holding and deciding in favor of the validity of the said statute of the State of New York and of the said authority exercised thereunder, whereby the said franchise tax was in manner aforesaid computed and imposed, as not repugnant to the Constitution of the United States, and consequent thereupon denying to said relator the relief, order and decree prayed for in its complaint in said cause.

XV. That the said Courts, respectively, erred in that their said respective final order and judgment were for and in favor of the said respondent, defendant in error, as Comptroller of the State of New York, when the same should have been for and in favor of the said petitioners.

The said petitioners, plaintiffs in error, pray judgment that the said final order and judgment aforesaid be in all things reversed, set aside and held for naught, and the said relator may be restored to all things which it has lost by occasion thereof.

IRA A. PLACE,
Attorney for Plaintiffs in Error.

THOMAS EMERY,
Of Counsel.

308 [Endorsed:] United States Supreme Court. The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, Plaintiffs in Error, against Otto Kelsey, as Comptroller of the State of New York, Defendant in Error. Assignment of Errors. (Tax of 1904.) Ira A. Place, Attorney for Plaintiffs in Error, Grand Central Station, Borough of Manhattan, New York City, N. Y.

309 *Petition for Writ of Error to the Court of Appeals of the State of New York.*

In the Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK, upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Plaintiffs in Error,

against

OTTO KELSEY, as Comptroller of the State of New York, Defendant in Error.

(Tax of 1904.)

To the Honorable Justices of the Supreme Court of the United States.

Come now the said petitioners The People of the State of New York upon the relation of The New York Central and Hudson River Railroad Company by their attorney, and as and by way of complaint of and against the said Otto Kelsey, as Comptroller of the State of New York, respondent, respectfully show to the Court:

That the said relator, The New York Central and Hudson River Railroad Company, was during all of the times mentioned in the record herein and is a domestic corporation of the State of New York, organized under the laws of and domiciled within that state, engaged in the business of a common carrier of persons and property between points respectively within that state, and between points respectively within either of the respective States of Massachusetts, New Jersey and Pennsylvania, and between points in either of the said respective states and points in either of the others thereof, and between
310 points in either of said states and points in other states and foreign countries, and between points in respective states other than the above, via and over routes extending through and over portions of one or more of the said respectively named states.

That by provision of the Tax Law of the State of New York, Section 180, the tax or license fee of and for domestic corporation organization, existence and capacity is imposed, exacted and paid once for all at the threshold of the vesting of corporate power; Section 182 thereof provides imposition of an annual franchise tax for and upon the exercise of domestic corporation franchises to be computed as therein provided upon the basis of the amount of corporate capital employed in said state within the tax year; and, Section 184 thereof provides imposition of an additional annual franchise tax to be computed upon the basis of the amount of corporate gross earnings therein within the tax year.

That during the year ending October 31, 1904, for and in respect of which the tax here in question was imposed and exacted, the said relator carried on its said business of a common carrier of persons and property in and by the operation of engines, cars and trains upon and over its owned and leased lines of railroad and lines of railroad upon and over which it had trackage rights, respectively, within the State of New York, and upon and over leased lines of railroad and lines of railroad upon and over which it had trackage rights, respectively, within the respective States of Massachusetts, New Jersey and Pennsylvania, upon all whereof it thus carried persons and property locally between points within either of the respective states wherein portions of its operated lines of railroad were situate,
311 and between points in either of those respective states and points in other states.

That in and about the carrying on of said transportation business by the said relator large numbers of its cars, though composed of frequently and constantly changing individual cars, passed into or out of the said respective States of New York, Massachusetts, New Jersey and Pennsylvania in such wise that at all times a large average number, to wit, many hundreds of the cars of said relator were continuously situate, employed and operated in the States of Massachusetts, New Jersey and Pennsylvania, respectively, upon and over railroads there situate, and in so doing were thus operated in the right of and under authority of the franchises in that behalf granted by those respective states and subject unto the burdens imposed and regulations prescribed in and by the public acts, laws, rules and ordinances of the respective state, and political subdivision thereof, wherein the said portion of road was situate and the said transportation service performed.

That the major part of the said relator's said transportation business consisted of such transportation by it upon and over portions of its said operated lines of road of so much of through carriage of persons and property starting or consigned from points outside of some one of the respective States of New York, Massachusetts, New Jersey and Pennsylvania and destined to points within some one of said respective states, or vice versa, and persons and property starting or consigned from points respectively without either of said states, passing en route through some one or more thereof, and destined to points respectively without either thereof.

That inasmuch as the said transportation service thus performed

and rendered by the said relator consisted of operations within
312 the said States of Massachusetts, New Jersey and Pennsylvania respectively, they consisted of and inhered in the exercise of franchises granted by those states respectively to corporations created by and domiciled within the said states, respectively, which were thus exercised by relator under and in pursuance of contracts of and for leases of, and contracts of and for trackage rights upon and over railroads there situate, together with the franchise to maintain and operate the same, granted, remised and accorded by the said corporations created by said respective states to the said relator, and exercised and enjoyed by the said relator in and under authority of the rights of its respective lessors and under and in pursuance of and subject unto the burdens imposed and regulations prescribed by the public acts and laws of the said States of Massachusetts, New Jersey and Pennsylvania respectively.

That in and by the exercise and performance of the functions thus employed by the said relator in the respective States of Massachusetts, New Jersey and Pennsylvania the only such function which it thus exercised under authority of the State of New York was that of its corporate existence, capacity and powers, the tax whereon or wherefor is no part of the tax here in question.

That the said franchise thus exercised by the said relator in the respective States of Massachusetts, New Jersey and Pennsylvania in and about and in respect of the there operation of its trains and transportation of persons and property were solely those granted and accorded by and under authority of the said respective states wherein the said operations were carried on and conducted, and were altogether and only subject unto regulations prescribed and pro-
313 mulgated by authority of those respective states and by authority of the United States, and not at all by authority of the State of New York.

That if and so far as it was within the province and power of the State, as distinguished from the United States, to impose or exact burdens upon or to prescribe regulations for and concerning the exercise by relator of the said franchises of railroad maintenance, train operation and transportation of persons and property, the province and power thereof solely inhered in and pertained to the said respective States of Massachusetts, New Jersey or Pennsylvania wherein the said respective railroad was situate and the said franchises were exercised, and not in or to the said State of New York.

That in and about the said relator's train operations and transportation of persons and property upon and over its said operated lines of railroad in the said respective States of New York, Massachusetts, New Jersey and Pennsylvania, respectively, in obedience to the requirements of the laws of the United States respecting through transportation from one state to another of carload commodities without reloading or breaking bulk, and otherwise in conformity with the methods generally observed and followed by common carrier railroad transportation companies within the United States, in the time last preceding and within the said tax year, large numbers of relator's cars of various kinds were from day to day transferred and delivered

from relator, and its said operated lines of railroad, in the respective States of New York, Massachusetts, New Jersey and Pennsylvania, to, and upon the railroads of and operated by, other common carrier railroad transportation companies foreign to and outside of the State of New York, whereby a large average number of relator's cars, consisting of more or less frequently changing individual cars,
314 were continuously and at any and all times out of the State of New York, and out of the possession, custody and use of the said relator, and in the meantime transferred and delivered, more or less frequently from one to another common carrier railroad transportation corporation, and by them employed outside of the State of New York in and about their mutual and respective transportation business, foreign to and entirely dissociated from the business of the said relator, and in such wise as rendered it impossible for the relator to know, be informed or make proof, what, if any, of the said cars, and the extent to which all or any thereof were employed in transportation business solely within or domestic to any state, or in transportation business between or among the several states, or between the United States and countries or dominions foreign thereto; all of which said employment was under authority of and in the exercise of franchises respectively granted by the respective State in which the respective portion of transportation service was performed and carried on, and none whereof were granted by the State of New York.

That all and singular the service performed and business carried on and conducted by the means and in the use of relator's said cars, as well in the instances of operation thereof by the said foreign corporations as also in the instances of the operation thereof by relator, as and when carried on and conducted within the bounds of either such respective state other than New York were thus rendered, carried on and conducted under and subject unto the public regulation in that behalf prescribed, and under the authority and protection in that behalf provided and afforded in and by and in pursuance of the public acts of the respective state within whose territorial bounds
315 each respective portion thereof transpired and occurred, save and except only as and wherein the said service and business were subject unto and governed by the constitution, laws and administration of the United States.

That subject only unto such exception of Federal control each such State other than the State of New York had and exercised the exclusive province of prescribing in and by its public acts all and singular the burdens and regulations which the portions of the said service and business conducted within its territorial limits should be subject unto; and it was not within the province of the State of New York to impose other or further burden or regulation upon or concerning either intra-state, interstate or foreign commerce or any part thereof carried on or conducted within the bounds of such other state even though such service was performed or such business was carried on and conducted by relator corporation created by and having its domicil in the State of New York, for that any and either such imposition of regulation or burden contravened the provisions of the Constitution of the United States in that it denied full faith and credit to

the public acts of such other state; deprived relator of the equal pro-
tection of the laws of the State of New York; deprived relator of the
equal protection of the laws of each such other State; oppressed the
local commerce of and thus and otherwise derogated from and in-
veighed against the dignity and sovereignty of each such other State;
transcended the power of the jurisdiction of the State of New York
in and by imposition of its tax burdens upon property, business and
avocation respectively having their situs outside the State of New
York and therein constituted the taking of the property of relator
without due process of law, and, oppressed the privilege, occu-
316 pation and business of interstate and foreign commerce in
manner aforesaid exercised, carried on and conducted by re-
lator in each of the respective States other than New York in which
its said cars were as aforesaid operated and employed.

That the capital of the said relator invested and employed in the
average number of the cars of the relator in manner aforesaid absent
from and employed outside of the State of New York in and during
the franchise tax year ending October 31, 1904, was in excess of the
sum of $19,960,789.08, which said sum stood in such relation to the
meantime total capital of said relator that in and by inclusion thereof
as subject unto the franchise tax to be computed upon the basis of the
relator's capital employed within the State of New York, the said
franchise tax was augmented and enlarged in and by the sum of
$12,077.93.

That the said Comptroller of the State of New York in and about
the imposition and laying of the said franchise tax upon and against
the said relator to be computed upon the basis of the capital of the
said relator employed within the State of New York during the said
tax year, and the said respective courts in and about their respective
final orders and judgments of affirmance of the said tax, imposed
and sustained the same computed upon the basis of and including all
of the cars of the said relator, the large average number whereof
were in manner aforesaid absent from and employed in state and
interstate and foreign commerce outside of the State of New York.

And the said petitioners further respectfully show unto the Court
and complain that in the said record and proceedings had in the
above entitled action (Taxes of A. D. 1904), and also in the rendition
of the final order and judgment in the same cause, in the Supreme
Court of the State of New York, sitting in Albany County
317 Third Judicial Department, at the Appellate Division, No-
vember Term thereof, A. D. 1905, to wit: November 14, 1905,
as also in the final order and judgment of the Court of Appeals of the
State of New York, to which last mentioned court the said cause was
appealed by said petitioners, being the highest court of law and equity
in said state, and the highest such court in which a decision could be
had in such cause, to wit; on January 23d, A. D. 1906, affirming on
appeal the said final order and judgment of the Supreme Court of the
State of New York, in the said cause between the said The People of
the State of New York upon the relation of The New York Central
and Hudson River Railroad Company, petitioners and plaintiffs in
error, and the said Otto Kelsey, as Comptroller of the State of New

York, respondent, and defendant in error, in each which Supreme Court and Court of Appeals, was drawn in question the validity of a statute of said state, and the validity of an authority exercised by the said Comptroller under said state, on the grounds that (1) they constituted a burden upon and regulation of commerce among the several states as carried on and conducted by the said relator and were thus repugnant to the commerce clause Article 1, Section 8, of the Constitution of the United States; (2) they impair the obligations of contracts of and with the said relator and were thus repugnant to Article 1, Section 10 of the Constitution of the United States; (3) they deprive the said relator of its property and property rights without due process of law and deny to it the equal protection of the laws, and were thus repugnant to the provisions of the fourteenth amendment of the Constitution of the United States, and (4) they deny and refuse to give full faith and credit to the public acts of such other respective states wherein relator's said cars were as aforesaid employed,
318 and were therein violative of Article 4, Section 1, of the Constitution of the United States, and the decision, final order and judgment of each thereof, the said Supreme Court and the said Court of Appeals, *was* in favor of such their validity; and that the said decision, final order and judgment of affirmance of the said Court of Appeals of the State of New York, together with the record and proceedings in said cause now remain in the said Court of Appeals of the State of New York before the justices thereof; in all whereof manifest error hath happened to the prejudice and damage of the said relator, The New York Central and Hudson River Railroad Company.

Wherefore, the said The People of the State of New York upon the relation of The New York Central and Hudson River Railroad Company, petitioners and plaintiffs in error, pray for the allowance of a writ of error, and for such other and further orders and process as may cause the record and proceedings aforesaid, with all things concerning the same, to be sent to the Supreme Court of the United States, that upon final hearing hereof the said error be corrected, and such other and further proceeding be ordered and had as according to law should be done.

And your petitioners will ever pray.

Dated January 24th, 1906.

IRA A. PLACE,
Attorney for Petitioners, Plaintiffs in Error.

Room 417, Grand Central Station, Borough of Manhattan, New York City, N. Y.

THOMAS EMERY, *Of Counsel.*

319 STATE OF NEW YORK, *County of New York, ss:*

Edward L. Rossiter, being duly sworn, says, that he is an officer of The New York Central and Hudson River Railroad Company, the petitioner herein, to wit, the Treasurer thereof; that the foregoing petition is true to the best of his knowledge and belief.

E. L. ROSSITER.

Sworn to before me this 24th day of January, 1906.
GEO. T. BROWN,
Notary Public, Westchester County.

Certificate filed in N. Y. County.

Allowed this 31 day of January, 1906.
EDGAR M. CULLEN,
Chief Judge of the Court of Appeals of the State of New York.

320 [Endorsed:] United States Supreme Court. The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, Plaintiffs in Error, against Otto Kelsey, as Comptroller of the State of New York, Defendant in Error. Petition for Writ of Error. (Tax of 1904.) Ira A. Place, Attorney for Plaintiffs in Error, Grand Central Station, Borough of Manhattan, New York City, N. Y.

321 United States Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant,
against
OTTO KELSEY, as Comptroller, etc., Respondent.

(Tax of 1904.)

Know all men by these presents, That we, The People of the State of New York *ex rel.* The New York Central and Hudson River Railroad Company, as principal, and the National Surety Company having an office and principal place of business at #346 Broadway, Borough of Manhattan, City of New York, as surety, are held and firmly bound unto Otto Kelsey, as Comptroller, etc., above-named, in the sum of Five hundred ($500.) Dollars to be paid to the said Otto Kelsey, as Comptroller, etc., his executors or administrators, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated the 24th day of January, 1906.

Whereas, the above-named Appellant has sued out a Writ of Error to the United States Supreme Court to reverse the judgment in the above entitled case by the Court of Appeals of the State of New York.

Now, therefore, the condition of this obligation is such that if the above-named Appellant shall prosecute said writ to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void otherwise to remain in full force and virtue.

[CORPORATE SEAL.]
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
By W. H. NEWMAN, *President.*

Attest:
D. W. PARDEE, *Secretary.*

NATIONAL SURETY COMPANY,
By JOEL RATHBONE, *Res. Vice-President.*

Attest:
[L. S.] RICHARD U. MORIARTY, *Res. Asst. Secretary.*

322 STATE OF NEW YORK, *County of New York, ss:*

On the 24th day of January in the year 1906, before me personally came William H. Newman, to me known, who being by me duly sworn did depose and say, that he resides in the City of New York; that he is the President of The New York Central and Hudson River Railroad Company, the corporation described in and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by authority of the Board of Directors of said Corporation, and that he signed his name thereto by like authority.

[SEAL.] ALBERT B. QUENCER,
Notary Public, N. Y. County, N. Y. (No. 1).

323 STATE OF NEW YORK, *County of New York, ss:*

On this 24th day of Jan. 1906, before me personally appeared Joel Rathbone, Res. Vice-President of the National Surety Company, with whom I am personally acquainted, who being by me duly sworn, said that he resides in the County of New York; that he is the Res. Vice-President of the National Surety Company, the corporation described in and which executed the within instrument; that he knows the corporate seal of said Company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company, and that he signed said instrument as Res. Vice-President of said Company by like authority; and that the liabilities of said Company do not exceed its assets, as ascertained in the manner provided in Section 3, Chapter 720 of New York Session Laws of 1893. And the said Joel Rathbone further said that he is acquainted with Richard U. Moriarty, and knows him to be the Res. Asst. Secretary of said Company; that the signature of the said Richard U. Moriarty, subscribed to the said instrument is in the genuine handwriting of the said Richard U. Moriarty, and was thereto subscribed by the like order of the said Board of Directors and in the presence of him, the said Joel Rathbone, Res. Vice-President.

MOLLIE SCHOENBRUN,
Notary Public for the County of N. Y., No. 347.

Certificate filed in Kings, Westchester, Richmond & Queens Counties.

Copy of By-Law.

Be it Remembered, That at a regular meeting of the Board of Directors of the National Surety Company, duly called and held on the 6th day of February, 1900, a quorum being present, the following By-Law was adopted:

"ARTICLE XIII. SEC. 1.—*Signatures Required.*—All bonds, re-
"cognizances, contracts of indemnity and other writings obligatory
"in the nature thereof, shall be signed by the President, the Vice-
"President, the Second Vice-President, a Resident Vice-President, or

"an attorney in fact, and, except when signed by an attorney in "fact, shall have the seal of the Company affixed thereto, duly at- "tested by the Secretary, an Assistant Secretary or a Resident Assist- "ant Secretary. The Vice-President, Second Vice-President and "Resident Vice-Presidents shall each have authority to sign such in- "struments whether the President be absent or incapacitated or not; "and the Assistant Secretaries and Resident Assistant Secretaries "shall each have authority to seal and attest such instruments, "whether the Secretary be absent or incapacitated or not. All such "instruments executed as herein provided shall be as binding upon "the Company as if the same were signed by the President, duly "sealed and attested by the Secretary."

STATE OF NEW YORK, *County of New York, ss:*

I, Richard U. Moriarty, Res. Asst. Secretary of the National Surety Company, have compared the foregoing copy of By-Law with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original By-Law.

Given under my hand and seal of the Company this 24 day of Jan. 1906.

[L. S.] RICHARD U. MORIARTY,
Res. Ass't Secretary.

Approved by
EDGAR M. CULLEN,
Chief Judge of the Court of Appeals.

324 [Endorsed:] United States Supreme Court. The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, Plaintiffs in Error, against Otto Kelsey, as Comptroller of the State of New York, Defendant in Error. Copy. Undertaking. (Tax of 1904.) Ira A. Place, Attorney for Plaintiffs in Error, Grand Central Station, Borough of Manhattan, New York City, N. Y.

325 The original of the foregoing supersedeas bond was lodged with the Clerk of the Court of Appeals of the State of New York, on February 2nd, 1906, and the following endorsement made thereon: Bond. Filed February 2nd, 1906—W. H. Shankland, Clerk of the Court of Appeals.

326 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of New York, possessors of the return and record in the action in which The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, are Plaintiffs and Otto Kelsey, as Comptroller of the State of New York, is Defendant, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea in the Court of Appeals of the State of New York, wherein final judgment upon return from the Supreme Court of the State of New York was rendered January 23, 1906, that being the highest Court of law and equity of the said State in which a decision could be had in the suit or action between The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, Plaintiffs in Error, and Otto Kelsey, as Comptroller of the State of New York, Defendant in Error, and which is now before you or some of you in said Court; wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity, a manifest error hath happened to the great damage of the said, The New York Central and Hudson River Railroad Company, as by its complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do
327 command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the said Supreme Court, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the first day of February in the year of our Lord one thousand nine hundred and six, and of our Independence the one hundred and thirtieth.

[Seal of the U. S. Circuit Court, Northern District N. Y.]

W. S. DOOLITTLE,
Clerk of the United States Circuit Court
for the Northern District of New York.

Allowed by
EDGAR M. CULLEN,
Chief Judge of the Court of Appeals
of the State of New York.

328 [Endorsed:] United States Supreme Court. The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company Plaintiffs in Error, against Otto Kelsey, as Comptroller of the State of New York, Defendant in Error. Writ of Error. (Tax of 1904.) Ira A. Place, Attorney for Plaintiffs in Error, Grand Central Station, Borough of Manhattan, New York City, N. Y.

329 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To Otto Kelsey, as Comptroller of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Court of Appeals of the State of New York, wherein The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 31st day of Jan'y in the year of our Lord one thousand nine hundred and six.

EDGAR M. CULLEN,
Chief Judge of the Court of Appeals of the State of New York.

330 [Endorsed:] United States Supreme Court. The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, Plaintiffs in Error, against Otto Kelsey, as Comptroller of the State of New York, Defendant in Error. Citation. (Tax of 1904.) Ira A. Place, Attorney for Plaintiffs in Error, Grand Central Station, Borough of Manhattan, New York City, N. Y. Due service of copy of within citation is hereby admitted this 5th day of February, 1906. Julius M. Mayer, Att'y for Def't in Error.

331 Court of Appeals of New York, on Appeal from the Appellate Division, Third Department.

THE PEOPLE OF THE STATE OF NEW YORK, upon the Relation of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Plaintiffs in Error,

vs.

OTTO KELSEY, as Comptroller of the State of New York.

(Tax of 1904.)

Papers on Appeal.

Ira A. Place, attorney for relator and appellant.
Julius M. Mayer, Attorney-General, attorney for respondent.

STATE OF NEW YORK:

Court of Appeals, Clerk's Office.

To the Judges of the United States Supreme Court:

The return of the judges of the Court of Appeals of the State of New York, in pursuance to the writ of error in the case of The People of the State of New York, upon the relation of The New York Central and Hudson River Railroad Company, appellant, *vs.* Otto Kelsey, as Comptroller of the State of New York, respondent, taxes of 1904, is contained in the papers and proceedings hereto attached.

In witness whereof I have hereunto set my hand and affixed my official seal at the city of Albany this 2nd day of February, 1906.

[Seal Court of Appeals, State of New York.]

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

Endorsed on cover: File No. 20,090. New York court of appeals. Term No. 588. The People of the State of New York upon the relation of The New York Central & Hudson River Railroad Company, plaintiff in error, *vs.* Otto Kelsey, as comptroller of the State of New York. Filed February 7th, 1906. File No. 20,090.

FILE COPY.

Supreme Court of the United States

OCTOBER TERM, 1905.

No. 61.

Office Supreme Court U. S.
FILED
MAR 10 1906
JAMES H. MCKENNEY,
Clerk

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

Plaintiffs in Error.

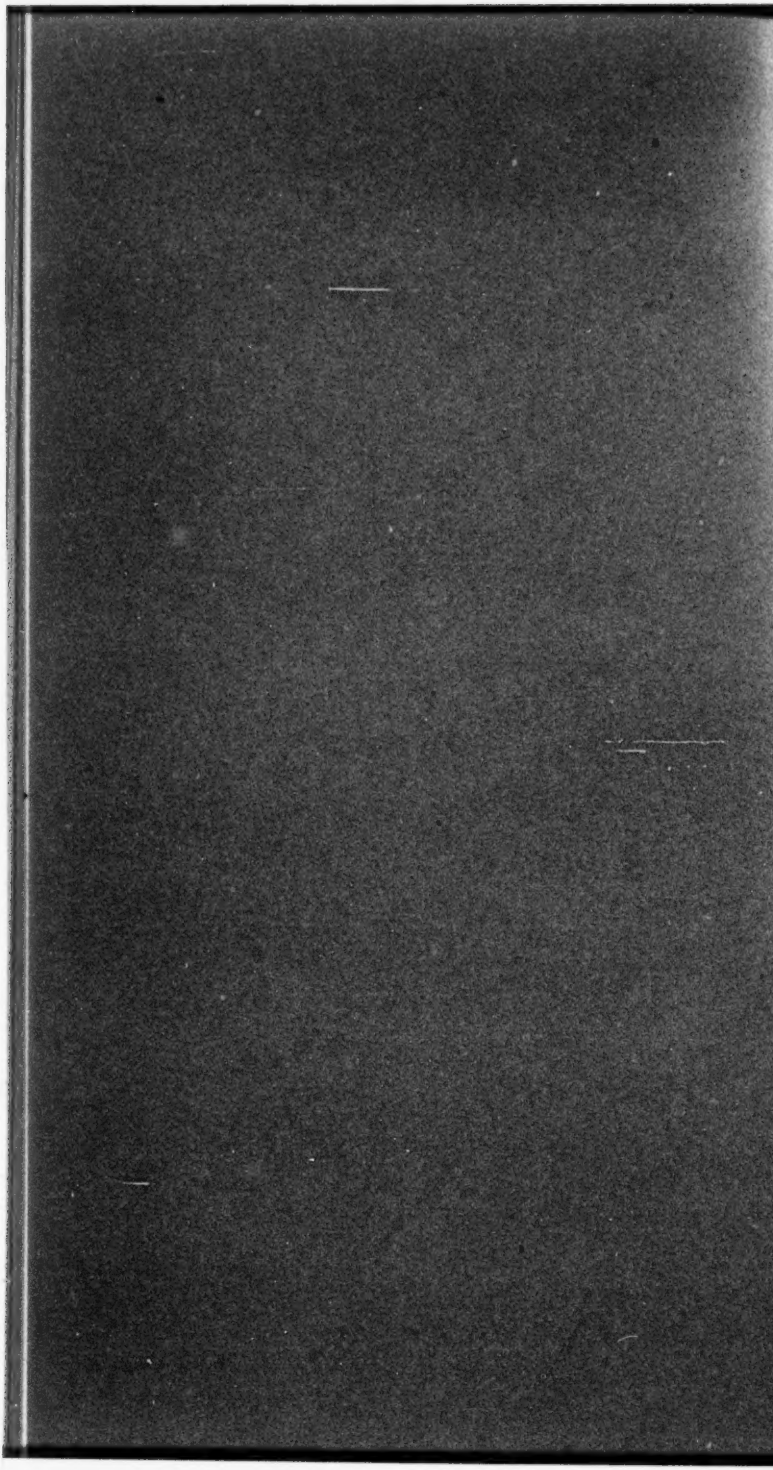
vs.

NATHAN L. MILLER, AS COMPTROLLER OF THE STATE OF NEW YORK,

Defendant.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

MOTION.



Come now The People of the State of New York upon the relation of The New York Central and Hudson River Railroad Company, Plaintiffs in Error, and move the Supreme Court of the United States that case No. 81 of this Term be put back upon the call.

12th of March, 1906.

SIR:

On the 12th of March, 1906, or as soon thereafter as counsel can in that behalf be heard, we will move the Supreme Court of the United States that the above and foregoing rule be granted.

Yours very truly,

IRA A. PLACE.
THOMAS EMERY.

To JULIUS M. MAYER,
Attorney General,
Attorney for Defendant.

For and on behalf of the defendant, Comptroller of the State of New York, I hereby join and unite in the request that the rule to be moved for as above be granted.

March the 12th, 1906.

JULIUS M. MAYER,
Attorney General,
Attorney for Defendant.

FILE COPY.

Supreme Court of the United States

OCTOBER TERM, 1905.

No. 82.

Office Supreme Court U. S.
FILED
MAR 10 1906
JAMES H. MCKENNEY,

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

Plaintiffs in Error,

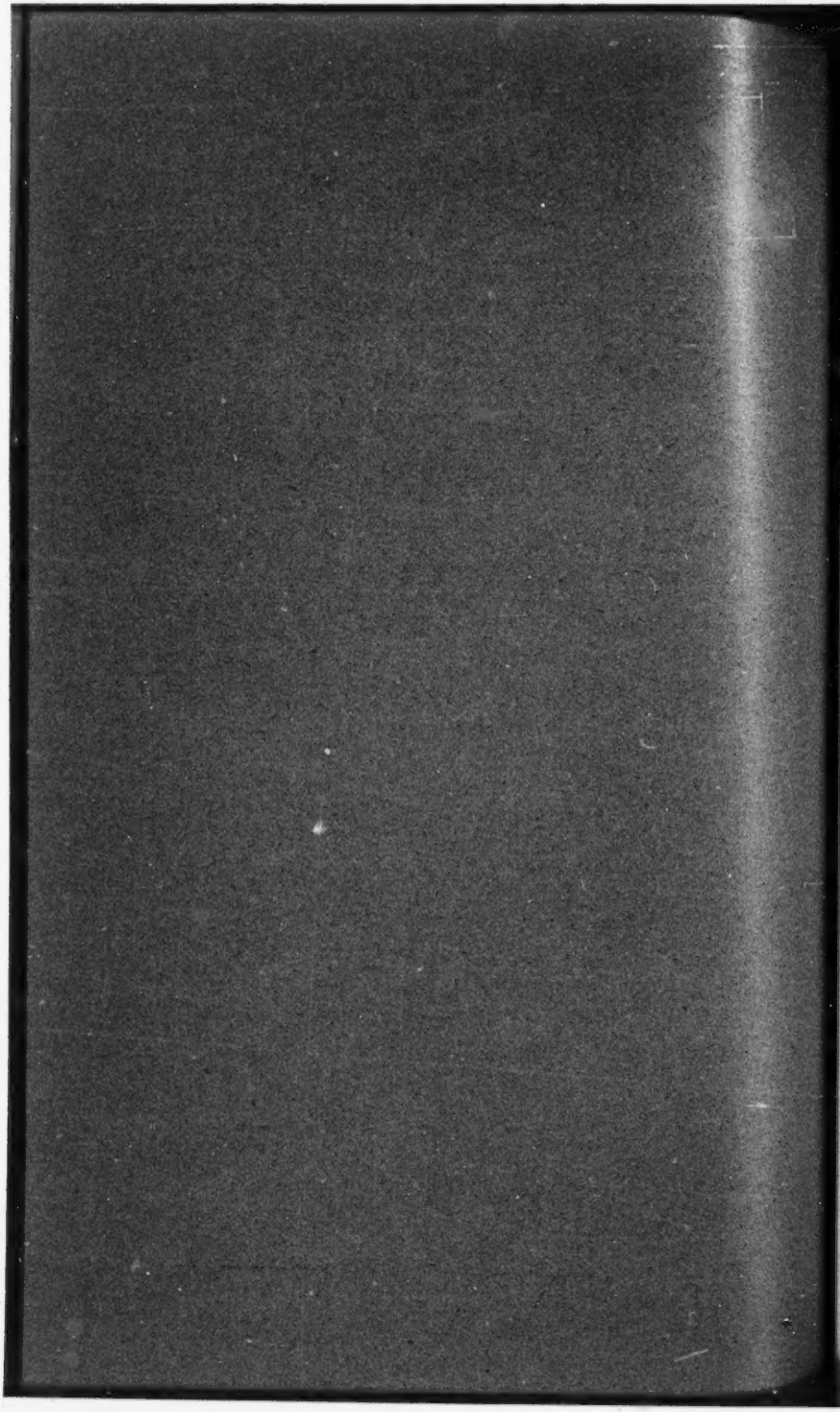
vs.

NATHAN L. MILLER, AS COMPTROLLER OF THE STATE OF NEW YORK,

Defendant.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

MOTION.



Come now The People of the State of New York upon the relation of The New York Central and Hudson River Railroad Company, Plaintiffs in Error, and move the Supreme Court of the United States that case No. 82 of this Term be put back upon the call and set down for hearing with case No. 81 of this Term.

These cases involve the question of the validity of so much of a franchise tax, imposed by defendant against relator under authority of Article IX. of the Tax Law of the State of New York, as is computed upon such amount of relator's capital stock as is invested in and represented by the average amount of relator's rolling stock which was continuously throughout the tax year situate and employed outside of the State of New York.

Case No. 81 has relation to the tax for the year 1900 and case No. 82 has relation to the tax for the year 1901, and both thereof involve the same questions.

12th of March, 1906.

SIR:

On the 12th of March, 1906, or as soon thereafter as counsel can in that behalf be heard, we will move the Supreme Court of the United States that the above and foregoing rule be granted.

Yours very truly,

IRA A. PLACE.
THOMAS EMERY.

To JULIUS M. MAYER,
Attorney General,
Attorney for Defendant.

For and on behalf of the defendant, Comptroller of the State of New York, I hereby join and unite in the request that the rule to be moved for as above be granted.

March the 12th, 1906.

JULIUS M. MAYER,
Attorney General,
Attorney for Defendant.

Supreme Court of the United States

OCTOBER TERM, 1905.

No. 295.

Office Supreme Court U. S.
FILED
MAR 10 1906
JAMES H. McKENNEY, Clerk.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

Plaintiffs in Error,

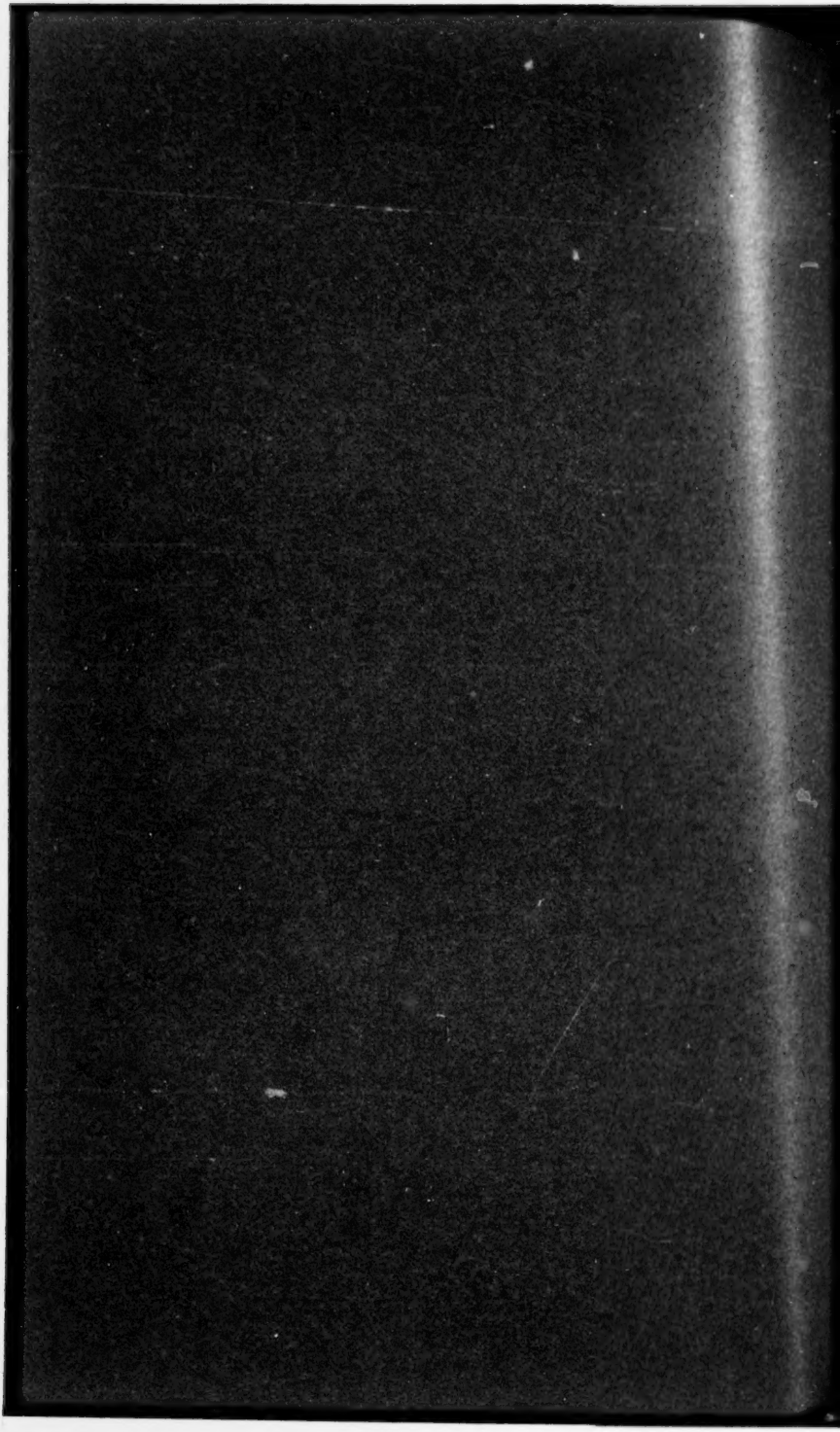
vs.

OTTO KELSEY, AS COMPTROLLER OF THE STATE OF NEW YORK,

Defendant.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION.



Come now The People of the State of New York upon the relation of The New York Central and Hudson River Railroad Company, Plaintiffs in Error, and move the Supreme Court of the United States that case No. 586 of this Term be advanced and set down for hearing with case No. 81 of this Term.

These cases involve the question of the validity of so much of a franchise tax, imposed by defendant against relator under authority of Article IX. of the Tax Law of the State of New York, as is computed upon such amount of relator's capital stock as is invested in and represented by the average amount of relator's rolling stock which was continuously throughout the tax year situate and employed outside of the State of New York.

Case No. 81 has relation to the tax for the year 1900 and case No. 586 has relation to the tax for the year 1902. The validity of the tax for the year 1902 is questioned on the same grounds as, and upon others than those set up in relation to the tax for the year 1900.

12th of March, 1906.

SIR:

On the 12th of March, 1906, or as soon thereafter as counsel can in that behalf be heard, we will move the Supreme Court of the United States that the above and foregoing rule be granted.

Yours very truly,

IRA A. PLACE.
THOMAS EMERY.

To JULIUS M. MAYER,
Attorney General,
Attorney for Defendant.

For and on behalf of the defendant, Comptroller of the State of New York, I hereby join and unite in the request that the rule to be moved for as above be granted.

March the 12th, 1906.

JULIUS M. MAYER,
Attorney General,
Attorney for Defendant.

Supreme Court of the United States

OCTOBER TERM, 1905.

No. 697.

Supreme Court U. S.
FILED
MAR 10 1906

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

Plaintiffs in Error,

vs.

OTTO KELSEY, AS COMPTROLLER OF THE STATE OF NEW YORK,

Defendant.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION.

Come now The People of the State of New York upon the relation of The New York Central and Hudson River Railroad Company, Plaintiffs in Error, and move the Supreme Court of the United States that case No. 587 of this Term be advanced and set down for hearing with case No. 81 of this Term.

These cases involve the question of the validity of so much of a franchise tax, imposed by defendant against relator under authority of Article IX. of the Tax Law of the State of New York, as is computed upon such amount of relator's capital stock as is invested in and represented by the average amount of relator's rolling stock which was continuously throughout the tax year situate and employed outside of the State of New York.

Case No. 81 has relation to the tax for the year 1900 and case No. 587 has relation to the tax for the year 1903. The validity of the tax for the year 1903 is questioned on the same grounds as, and upon others than those set up in relation to the tax for the year 1900.

12th of March, 1906.

SIR:

On the 12th of March, 1906, or as soon thereafter as counsel can in that behalf be heard, we will move the Supreme Court of the United States that the above and foregoing rule be granted.

Yours very truly,

IRA A. PLACE.
THOMAS EMERY.

To JULIUS M. MAYER,
Attorney General,
Attorney for Defendant.

For and on behalf of the defendant, Comptroller of the State of New York, I hereby join and unite in the request that the rule to be moved for as above be granted.

March the 12th, 1906.

JULIUS M. MAYER,
Attorney General,
Attorney for Defendant.

Supreme Court of the United States

OCTOBER TERM, 1905.

No. 880.

Office Supreme Court U. S.
FILED
MAR 10 1906
JAMES H. MCKENNEY,
Clerk.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

Plaintiffs in Error,

vs.

OTTO KELSEY, AS COMPTROLLER OF THE STATE OF NEW YORK,

Defendant.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION.

Come now The People of the State of New York upon the relation of The New York Central and Hudson River Railroad Company, Plaintiffs in Error, and move the Supreme Court of the United States that case No. 588 of this Term be advanced and set down for hearing with case No. 81 of this Term.

These cases involve the question of the validity of so much of a franchise tax, imposed by defendant against relator under authority of Article IX. of the Tax Law of the State of New York, as is computed upon such amount of relator's capital stock as is invested in and represented by the average amount of relator's rolling stock which was continuously throughout the tax year situate and employed outside of the State of New York.

Case No. 81 has relation to the tax for the year 1900 and case No. 588 has relation to the tax for the year 1904. The validity of the tax for the year 1904 is questioned on the same grounds as, and upon others than those set up in relation to the tax for the year 1900.

12th of March, 1906.

SIR:

On the 12th of March, 1906, or as soon thereafter as counsel can in that behalf be heard, we will move the Supreme Court of the United States that the above and foregoing rule be granted.

Yours very truly,

IRA A. PLACE.
THOMAS EMERY.

To JULIUS M. MAYER,
Attorney General,
Attorney for Defendant.

For and on behalf of the defendant, Comptroller of the State of New York, I hereby join and unite in the request that the rule to be moved for as above be granted.

March the 12th, 1906.

JULIUS M. MAYER,
Attorney General,
Attorney for Defendant.

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

FILED

MAR 29 1906

No. 81.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, *Plaintiff-in-Error*,

vs.

NATHAN L. MILLER, AS COMPTROLLER OF THE STATE OF NEW YORK.

No. 82.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, *Plaintiff-in-Error*,

vs.

NATHAN L. MILLER, AS COMPTROLLER OF THE STATE OF NEW YORK.

No. 586.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, *Plaintiff-in-Error*,

vs.

OTTO KELSEY, AS COMPTROLLER OF THE STATE OF NEW YORK.

No. 587.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, *Plaintiff-in-Error*,

vs.

OTTO KELSEY, AS COMPTROLLER OF THE STATE OF NEW YORK.

No. 588.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, *Plaintiff-in-Error*,

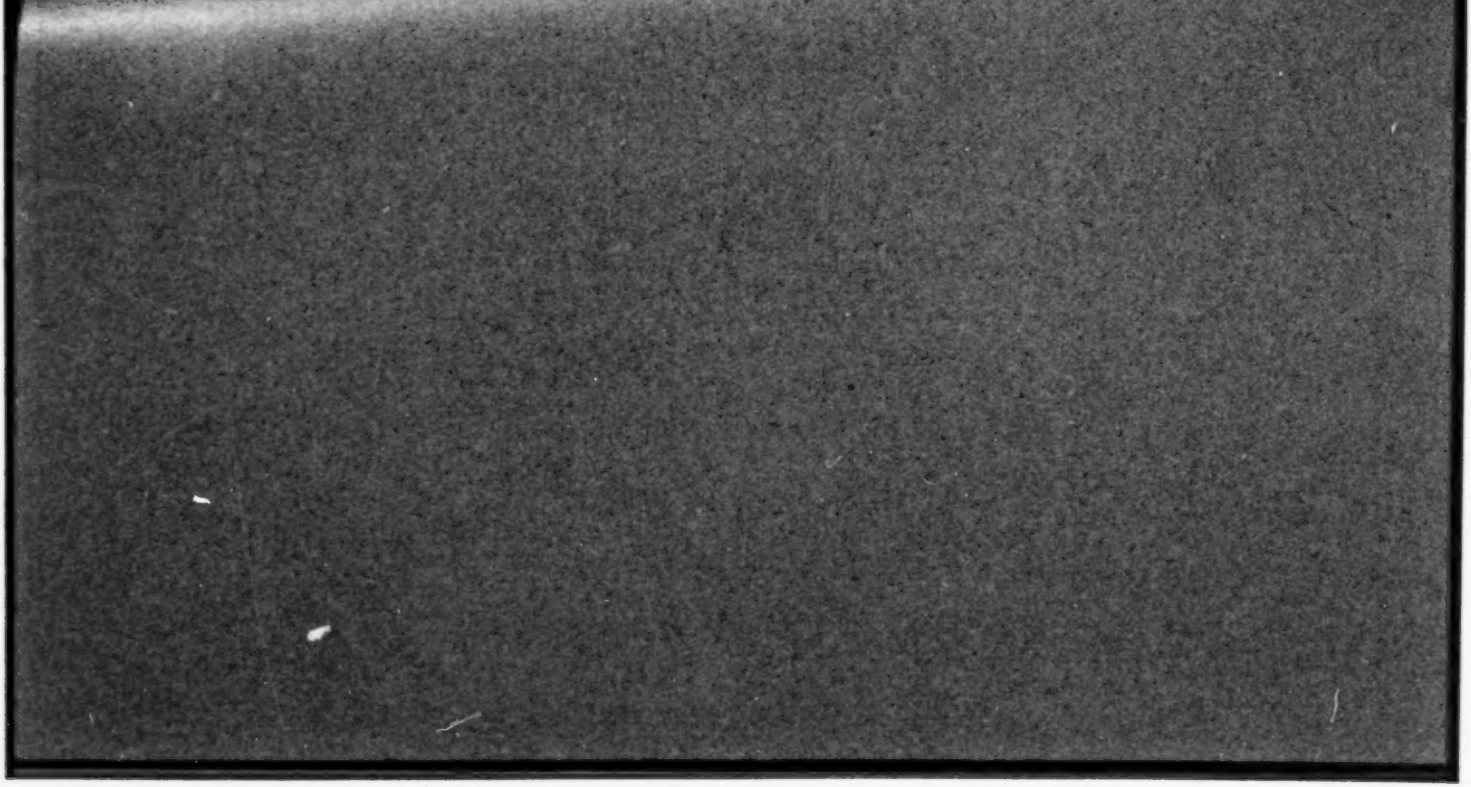
vs.

OTTO KELSEY, AS COMPTROLLER OF THE STATE OF NEW YORK.

Brief for Plaintiff-in-Error.

IRA A. PLACE,
Attorney for Plaintiff-in-Error.

ALBERT H. HARRIS,
THOMAS EMERY,
Of Counsel.



Statement of the Case.

These are proceedings in error, cases Numbers 81 and 82 being writs of error to the Supreme Court of the State of New York, and Numbers 586, 587 and 588 writs of error to the Court of Appeals of the State of New York, to review the judgments of the state courts sustaining franchise taxes imposed against relator, plaintiff in error, under color of the authority of Section 182 of the Tax Law of the State of New York. The respective cases have relation to the said tax for respective tax years ending October 31st, case No. 81 tax of 1900, No. 82 tax of 1901, No. 586 tax of 1902, No. 587 tax of 1903, and No. 588 tax of 1904.

Relator was during the said tax years and is a railroad corporation organized and existing under authority of the laws of the State of New York, owning and possessing a line of railroad extending from the city of New York to the city of Buffalo, and sundry branches, all in the State of New York; and lessee in possession of other lines of railroad wholly within the State of New York, and of still other lines of railroad, some thereof partly within the State of New York and partly within the States of Massachusetts, New Jersey and Pennsylvania, respectively,

and others thereof, respectively, wholly within some one of the said states other than New York.

During all of said tax years relator was and is operating its said owned and leased lines of railroad in the capacity of a common carrier of persons and property between points respectively within each of the respective States of New York, Massachusetts, New Jersey and Pennsylvania, and between points within either of the said states and points respectively in others of the United States, and between points respectively without the State of New York *via* routes some thereof in part within and others thereof wholly without the State of New York.

Also during each of the said tax years the said relator was and is, under a system of agreements and arrangements with other common carrier railroad and other transportation companies for through routing and rating, engaged in the through transportation of persons and property between points upon the said lines of railroad so operated by it, and points in other states and foreign dominions, upon and reached by and over the lines and routes of the said other common carrier railroad and other transportation companies.

The railroad lines thus operated by relator, subject to minor changes from year to year, had a total main line mileage of 3,490.26 miles, of which 2,594.32 miles was within the State of New York, 336.60 miles thereof was within the State of Massachusetts, 24.89 miles thereof was within the State of New Jersey, and 534.45 miles thereof was within the State of Pennsylvania.

Relator used and operated such portion of its rolling stock as was from time to time in its possession, as an entire system in operating upon and over its said entire operated railroad mileage, whereby a large average proportion thereof was at all times in use and operation by it upon its operated lines of railroad in the said respective states other than New York; such employment thereof

being both in transportation between points both within either of such respective states other than New York, and between points within either such state other than New York and points in other states and foreign dominions.

In and about and incident to the use and employment of relator's cars in through transportation of persons and property to and from points on lines of railroad of other common carrier railroad companies situate in other states and foreign dominions, large numbers of relator's cars were continually passing from its possession into the possession of said other railroad companies, and were possessed, used and employed by them, and by still other such companies to whom the said cars were delivered in due course of business, and were by said companies, respectively, used and employed in such other states and foreign dominions, as well in transportation of persons and property between points situate in respective states other than New York, as also between points within those, and points in other respective states, and foreign dominions.

Illustrative of this usual and customary course of transportation business were the movements or transfers from one railroad transportation company to another of a considerable number of individual cars of relator, among others, to wit: car No. 90110, leaving Lockport, N. Y., September 30, 1902, destined to Oklahoma City, performed its said destined service and in due course was returned to relator on November 19, 1902 (No. 586 P. R., 62); car No. 31772, leaving Schenectady, N. Y., March 6, 1902, destination Clearwater, S. C., was returned to relator on July 2, 1902 (*id.*, 62); car No. 56491, leaving Weehawken March 17, 1902, destined to Berlin, Ontario, performed its said service and was in ordinary course returned to relator on April 16, 1902 (*id.*, 63); car No. 41278, delivered by relator to Michigan Central Railroad Company on April 19, destined to Detroit, Mich. (*id.*, 40),

was continuously out of relator's possession for a period of 7 months and 28 days, during which it was transferred 14 times from one railroad company to another (*id.*, 63); car No. 41038, delivered by relator to L. S. & M. S. Ry. Co. on April 28, destination not shown, was continuously out of relator's possession for a period of 4 months and 11 days, during which it was transferred from one railroad company to another 19 times (*id.*, 64); car No. 59578, delivered by relator to L. S. & M. S. Ry. Co. on April 2, destination Chicago (*id.*, 40), was out of relator's possession 7 months and 29 days, during which it was, as aforesaid, transferred 18 times (*id.*, 64); car No. 63158, delivered by relator to L. S. & M. S. Ry. Co. June 12, destination Chicago (*id.*, 40), was out of relator's possession 3 months and 29 days, during which it was transferred 9 times (*id.*, 65); car No. 18236, delivered by relator to Michigan Central Railroad Company March 5, destination Grand Rapids, Mich. (*id.*, 40), was out of relator's possession 9 months and 15 days, during which it was transferred 15 times (*id.*, 65); car No. 63123, delivered by relator to L. S. & M. S. Ry. Co. June 15, destination Cleveland, Ohio (*id.*, 40), was out of relator's possession 6 months and 6 days, during which it was transferred 19 times (*id.*, 66); car No. 63176, delivered by relator to L. S. & M. S. Ry. Co. February 11, destination Edison, Ohio (*id.*, 40), was out of relator's possession 10 months and 7 days, during which period it was transferred 27 times (*id.*, 66): car No. 64431, delivered by relator to L. S. & M. S. Ry. Co. June 27, destination Chicago (*id.*, 40), was out of relator's possession 3 months and 25 days, during which period it was transferred 12 times (*id.*, 67); car No. 61834, delivered by relator to L. S. & M. S. Ry. Co. July 2, destination San Francisco, Cal. (*id.*, 40), was out of relator's possession 5 months and 16 days, during which it was transferred 8 times (*id.*, 67); car No. 14035, delivered by relator to L. S. & M. S. Ry. Co. December

20, 1901, was out of relator's possession 1 year and 14 days, during which it was transferred 18 times (*id.*, 68); car No. 27941, delivered by relator to Michigan Central Railroad Company June 12, 1902, destination Joliet, Ill. (*id.*, 40), was out of relator's possession 5 months and 13 days, during which it was transferred 13 times (*id.*, 69); car No. 90350, from Weehawken, destined to San Francisco, delivered by relator to Michigan Central Railroad Company March 4, 1904, was out of relator's possession until July 31, 1904, during which period it was transferred 18 times (*id.*, 164); car No. 63379, from Weehawken, destination Minneapolis, delivered by relator to Wabash Railroad Company March 14, 1904, returned to relator May 18, 1904, during which period it was transferred 14 times (*id.*, 164); car No. 11645, from Weehawken, destination Victoria, B. C., delivered to Canadian Pacific Railroad Company March 15, 1904, in the hands of L. S. & M. S. Ry. Co., on August 29, 1904, during which period it was transferred 24 times (*id.*, 165); car No. 46260, from Weehawken, destination Medicine Lodge, Kansas, delivered to Wabash Railroad Company March 21, 1904, returned to relator April 5, 1904, during which period it was transferred 8 times (*id.*, 165); car No. 64397, from Weehawken, destination Hamilton, Ontario, delivered by relator to Canadian Pacific Railroad Company March 21, 1904, returned to relator July 18, 1904, during which period it was transferred 21 times (*id.*, 166); car No. 24241, from Weehawken, destination Winnipeg, Manitoba, delivered by relator to Canadian Pacific Railroad Company March 25, 1904, returned to relator April 5, 1904 (*id.*, 166); car No. 64887, from Weehawken, destination Minneapolis, delivered to Canadian Pacific Railroad Company March 26, 1904, returned to relator April 11, 1904 (*id.*, 167); car No. 65224, from Weehawken, destination Duluth, delivered to Canadian

Pacific Railroad Company April 2, 1904, returned to relator April 22, 1904 (*id.*, 167).

Comparison of the movements of these respective cars outside of the State of New York establishes that in the majority of instances the time of absence of the car from relator's possession, and the measure of use thereof by foreign corporations on their railroads, bears no substantial relation to the measure of such operation required for the purpose of carrying to its destination the loading with which the car leaves relator's road and the subsequent return thereof with loading destined to some point upon relator's road or otherwise return of the car.

As is seen, cars destined to points as far distant as San Francisco, Cal., are in some instances returned to relator within a very few days, while in the majority of instances cars destined to points quite a short distance relatively from relator's operated line, are continuously out of its possession for a series of months.

The leased lines of railroad operated by relator outside of this State included various roads in Pennsylvania directly connected with coal mines there situate, and the principal business of such operation thereof was the transportation of coal; in the ordinary course of business coal cars are not, like ordinary merchandise box and freight cars, reloaded at or near the place where previous loading has been delivered, either in course of return to or toward the owning road or otherwise, but are in ordinary course returned empty to the mine tipples to be again reloaded; and a large proportion of the cars of relator used in that service are thus used in carrying coal to and over relator's operated lines and connecting railroads to destination without at all entering the State of New York (*id.*, 42).

The roads so operated by relator outside of the State of New York are maintained and operated by virtue of and under authority of franchises granted by the respective

states in which the said roads respectively are situate, and operated by relator by virtue of and under authority of lease or trackage right to it of such road and franchise and under the terms whereof relator is required to and does pay any and all state taxes imposed upon the said road and franchises and privileges of operation thereof (*id.*, 31).

Stated in as brief detail as may be the record presented in No. 81 is as follows:

Of date, November 30, 1900, relator, plaintiff in error, made report in writing to the State Comptroller for the tax year ending October 31, 1900, as the basis of a franchise tax to be computed upon the amount of its capital stock employed within that state (P. R., 36).

This report showed relator's issued capital stock for the tax year $108,750,000 of the average value per $100 share $129.8125, aggregating $141,171,093.75. That of its total capital or assets 60.37 per centum was employed in the State of New York and 39.63 per centum employed outside of that state. That thus of its said capital stock $65,652,375 of the market value of $85,224,989.30 was employed in New York State, and upon which the tax of one and one-half mills on the dollar would amount to $127,837.48.

The State Comptroller computed and assessed the tax upon capital stock of $106,000,000, to wit, $159,000 (P. R., 7).

Relator made application to the Comptroller for resettlement of the tax (P. R., 16), which, after hearing had thereon (P. R., 16) the Comptroller refused (P. R., 8).

Upon that hearing relator made proof of the amount of its total capital or assets and the portions thereof employed respectively within and outside of the State of New York, the latter including the average amount of equipment employed outside the State, to wit, $15,230.-186.06,

Upon review of that determination in and by the Supreme Court, Appellate Division, that Court found as matter of fact the said

> "item of $15,230,186.06, being such proportion of all of relator's rolling stock as the mileage thereof without the State bears to the entire mileage of said rolling stock" (P. R., 41);

and as matter of law adjudged, *inter alia*, that in the fixing of the amount upon which the tax should be computed that item should be excluded (P. R., 41).

From the order and judgment of that Court both parties appealed to the Court of Appeals (P. R., 46).

The Court of Appeals adjudged that the order of the Appellate Division

> "be and the same hereby is modified as indicated in the opinion of Haight, *J.*, and proceedings remitted to the Comptroller," (P. R., 1), viz:
> "to the end that further evidence may be taken upon that subject in case it should be claimed that some portion of relator's rolling stock was used continuously outside of the State, and if it should be found that such was the fact, the amount thereof should be deducted" (P. R., 49).

Upon that rehearing relator made proof that the value of its total movable equipment, the average amount employed by it outside of New York State, and the car movements of various of its cars while out of its possession (P. R., 84–89), and that these were fairly illustrative of the general character of the movements and use of its cars when in the hands of other railroad companies (P. R., 75), and thus showed how its equipment of the average value of $15,230,186.06 mentioned in the said report (P. R., 82) was continuously employed outside of New York State, and showing the basis of computation thereof, to wit:

> "We receive from other railroads records of the number of miles made by our cars upon other lines, but they don't give us the number of individual cars.

Their reports to us simply show: Your cars made during the month so-and-so upon our line so many miles; that might be ten or it might be fifty cars. We assemble together all these miles made upon other roads and then divide that total between the miles made by cars on other roads in New York State and on other roads out of New York State" (P. R., 80).

The Comptroller refused to further resettle the tax (P. R., 61); and upon review by the Supreme Court, Appellate Division, that determination was affirmed, the grounds of affirmance being stated as follows:

"The original determination of the comptroller imposing the franchise tax under section 182 of the tax law, upon the relator for the year ending October 31, 1900, was reviewed by this court and a readjustment order (People *ex rel.* N. Y. C. & H. R. R.R. Co. *vs.* Knight, 75 App. Div., 169). On that readjustment it was held that the relator was entitled to be credited on the value of its rolling stock with the sum of $15,230,186.06, which was the proportionate value of the average amount of its rolling stock employed outside the State during the year.

"Upon a review of our decision by the court of appeals, that court decided that the relator could not be credited with this average amount of its rolling stock employed outside the State during the year, but only such of it as was used exclusively and continuously outside, and remitted the proceedings to the comptroller for further hearing upon that subject (People *ex rel.* N. Y. C. & H. R. R.R. Co. *vs.* Knight, 173 N. Y., 255).

"The relator failed to establish upon such hearing that it employed any of its rolling stock in this manner, and the comptroller has properly found that none was so employed, and it remains only for us to confirm his determination" (P. R., 92).

Upon appeal to the Court of Appeals that court upon hearing adjudged:

"Orders affirmed, with costs, on opinion in People *ex rel.* N. Y. C. & H. R.R. Co. *vs.* Knight (173 N. Y., 255)" (P. R., 95).

The ground thus announced as the basis of the decision is stated in the opinion mentioned, to wit:

> "I concur in the conclusions reached by O'Brien, *J.*, except as to that part thereof which holds that the item of $15,230,186.06 is not taxable. The court below found that this item represented the rolling stock employed outside of the State, it 'being such proportion of all of relator's rolling stock as the mileage thereof without the State bears to the entire mileage of said rolling stock.' As I understand this finding it is to the effect that the rolling stock of the relator is used in this State and outside of the State; that is, cars are loaded at some point in the State, as, for instance, in the city of New York, and run over the relator's road to some other point, say the city of Buffalo. They then are transferred on to other roads and are run to points outside of the State where they are unloaded and then reloaded and returned to this State. The entire mileage includes that traveled in this State as well as that out of the State; this, with the distance traveled outside of the State and the total value of the stock, furnishes the proportion upon which the computation is made.
>
> The question is as to whether this stock is taxable under the statute. The relator is a domestic corporation. It owns the rolling stock. It is used upon its lines of railroad in this State. True, the cars are transferred on to other roads and are run outside of the State for the purpose of facilitating the transportation of persons and freight without change of cars or of breaking bulk, but the use of the cars outside of the State is but temporary, for they are returned as soon as reloaded and are again used in the transportation of persons and property within this State. It seems to me, therefore, that, under a fair and reasonable construction of the statute, this item should have been included as capital employed within this State" (P. R., 49).

In thus deciding the Court held and adjudged:

> "That the statute (1) does not offend against the commerce clause (article 1 of section 8) of the Fed-

eral Constitution, (2) does not contravene the provisions of article 1, section 10, thereof forbidding impairment of the obligations of contracts, (3) does not offend against the provision of the fourteenth amendment thereof forbidding the State to deprive any person of property without due process of law" (P. R., 94).

In case No. 82 the hearing before the State Comptroller for resettlement of the tax of 1901 was had at the same time as the second hearing before that officer regarding the tax of 1900, and the record is in essential respects, except as to amounts, the same as that in case No. 81.

The determination of the Comptroller was affirmed in both cases by the Supreme Court, Appellate Division, November 10, 1903 (No. 81 P. R., 90; No. 82 P. R., 46); and by the Court of Appeals, February 23, 1904, "On opinion in *People ex rel. N. Y. C. & H. R. R.R. Co.* vs. *Knight* (173 N. Y., 255)," (No. 81 P. R , 93–95; No. 82 P. R., 48–50), and the same grounds of constitutional objection ruled upon in each (No. 81 P. R., 94; No. 82 P. R., 49).

The records in cases 586, 587 and 588, respectively, show that the constitutional grounds of objection to the tax were presented in and by the application to the State Comptroller for resettlement of the tax, and in the petition for the writ of certiorari to review the Comptroller's determination of and upon the said application, to wit:

> "That if and in so far as the enactments under color of which this tax is imposed purport to authorize taxation for or upon or in respect of the aforesaid use or exercise of franchises foreign to the State of New York, or computed upon the basis of capital thus in manner aforesaid used and employed within the territorial jurisdiction of other states, territories or foreign dominions, in the use and exercise of, and under the authority of franchises granted by them or by the United States to corporations created by them, respectively, the said enactments are beyond the

power and prerogative of the State of New York to prescribe and enforce and are violative of and contravene the constitution, laws and treaties of the United States in that they deprive petitioner of the equal protection of the laws; also, in that they constitute the taking of property without due process of law; also, in that they constitute a regulation of, interference with and a burden upon inter-state commerce and foreign commerce; also, in that they impugn the dignity and sovereignty of the United States and of sister states and of foreign dominions; also, in that they impair the obligations of the contracts arising upon and inhering in the grant to and acceptance by the corporations the lessors and licensors of said petitioner of the franchises by it as lessee and licensee used and exercised in respective states, territories and dominions other than and foreign to the State of New York; also, in that they impair the obligations of the contracts of lease of trackage right and license respectively, under and by virtue of which petitioner uses and exercises in respective states and territories other than the State of New York and in foreign dominions the franchises granted by them respectively to the lessors and licensors of said petitioner; also, in that they impair the obligations of the contracts, express and implied, under which petitioner is required to and does order, direct and permit or order, direct or permit its movable equipment to pass to and remain in the custody and subject to the control of other corporations and be by them controlled and used in and about the transportation of persons and property upon their roads in other states and territories and foreign dominions under authority of and in the use and exercise of franchises granted by them respectively; also, in that the said enactments, and the judgments of the officers and tribunals in and of the State of New York sustaining and administering them, in and by imposing and exacting payment to the State of New York of a franchise tax computed upon the basis of the capital of said petitioner employed within the territorial jurisdiction of other re-

spective States, in the use and exercise of franchises granted by them, respectively, deny and refuse to give 'to the public acts' of said other respective States, by and under which the said franchises are granted, and the use and exercise thereof authorized and regulated, the 'full faith and credit' force and effect which the said public acts are entitled to have, and do have, in the respective States whose acts they are," etc. (P. R., 8, 9; 17, 18).

The evidence included statutes and judicial decisions showing the taxation which the franchises used by relator and its use thereof were subject unto in the States of Massachusetts, New Jersey and Pennsylvania respectively (No. 586 P. R., 31, 42), as also the general system and business practice under and in pursuance of which the large average portion of relator's cars, consisting, however, of constantly changing individual cars, were continuously and permanently possessed and used by other common carrier railroad companies outside of the State of New York, not only in the part performance of transportation beginning or ending upon relator's operated lines of railroad but also and largely in acts of transportation having no relation to relator's transportation business. (No. 586 P. R., 62–69, 164–167).

The values of the average amounts of relator's equipment shown to have been continuously employed outside of the State of New York during the respective tax years were:

1902, by relator, $4,780,862.98, and by foreign corporations, $11,865,528.08 (586 P. R., 61); 1903, by relator, $3,148,216.64, and by foreign corporations, $16,254,384.74 (587 P. R., 46); 1904, by relator, $3,513,619.12, and by foreign corporations, $16,447,169.96 (588 P. R., 45).

In and by the resettlements which the Comptroller awarded and made, after and consequent upon the hearing upon relator's said applications, he deducted from

the tax, and credited to relator, upon the tax of 1902 the sum of $4,934.47 (586 P. R., 6), being exactly the aggregate of the sums of $1,931.58 and $3,002.89 claimed by relator (*id.*, 14, 16, 61), in respect of the matters named, other than outside employed equipment.

Upon the tax of 1903 relator claimed credits on matters other than outside employed equipment $1,189.52 (587 P. R., 14), and $622.72 (*id.*, 16), aggregating $1,812.24 and $13,984.41 on outside employed equipment (*id.*, 16). The Comptroller awarded a credit of $1,932.17 (*id.*, 6), being slightly in excess of the credit claimed by relator as to matters other than outside employed equipment.

Upon the tax of 1904 the relator claimed credit solely in respect of outside equipment $12, 649.50 (588 P. R., 15-18), and the Comptroller awarded it a credit of $571.57 (*id.*, 6).

The tax, in respect of capital stock represented by the average amounts of outside equipment, which the Comptroller refused resettlement and deduction of, thus stands, for 1902, $13,909.28 (586 P. R., 9), for 1903, $13,864.48 (587 P. R., 9), and for 1904, $12,077.93 (588 P. R., 9).

The three cases were heard and determined together, and without opinion, in the Supreme Court, Appellate Division (P. R., 167-169); and upon appeal in the Court of Appeals (P. R., 171-173).

In and by such its determination the Court of Appeals held and adjudged, to wit :

> "The relator having contended herein that the statute, if it purport to authorize the said tax, and the authority exercised under the Statute in and by the imposition and exaction of the said tax are and each thereof is violative of the Constitution of the United States in the several particulars following; the court hold and adjudge that the statute under and in pursuance of which the tax herein complained

of is imposed and exacted does not, and the authority exercised under this Statute in and by the imposition and exaction of the said tax does not, (1) offend against the commerce clause, Article 1, Section 8, of the Constitution of the United States; (2) nor contravene the provisions of Article 1, Section 10, thereof forbidding impairment of the obligations of contracts; (3) nor offend against Article 4, Section 1, thereof requiring that full faith and credit shall be given in each State to the public acts of every other State; (4) nor offend against the provisions of the fourteenth amendment thereof forbidding the State to deprive any person of property without due process of law, and forbidding the State to deny to any person within its jurisdiction the equal protection of the laws." (P. R., 170-172.)

Section 182 of the Tax Law of the State of New York as in force in the tax year ending October 31, 1900, is as follows:

"FRANCHISE TAX ON CORPORATIONS.—Every corporation, joint stock company or association incorporated, organized or formed under, by or pursuant to law in this state, shall pay to the state treasurer annually, an annual tax to be computed upon the basis of the amount of its capital stock employed within this state and upon each dollar of such amount, at the rate of one-quarter of a mill for each on[illegible]er centum of dividends made and declared upon its [illegible]ital stock during each year ending with the thirty-first day of October, if the dividends amount to six or more than six per centum upon the par value of such capital stock. If such dividend or dividends amount to less than six per centum on the par value of the capital stock, the tax shall be at the rate of one and one-half mills upon such portion of the capital stock at par as the amount of capital employed within this state bears to the entire capital of the corporation. If no dividend is made or declared, the tax shall be at the rate of one and one-half mills upon each dollar of the appraised capital employed within this state. If such corporation, joint stock com-

pany or association shall have more than one kind of capital stock, and upon one of such kinds of stock a dividend or dividends amounting to six, or more than six percentum, upon the par value thereof, has been made or declared, and upon the other no dividend has been made or declared, or the dividend or dividends made or declared thereon amount to less than six per centum upon the par value thereof, then the tax shall be at the rate of one-quarter of a mill for each one per centum of dividends made or declared upon the capital stock upon the par value of which the dividend or dividends made or declared amount to six or more than six per centum, and in addition thereto a tax shall be charged at the rate of one and one-half mills upon every dollar of the valuation made in accordance with the provisions of this act of the capital stock upon which no dividend was made or declared, or upon the par value of which the dividend or dividends made or declared did not amount to six per centum. * * * Every corporation, joint stock company or association organized, incorporated or formed under the laws of any other state or country, shall pay a like tax for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, to be computed upon the basis of the capital employed by it within this state."

The section was amended by Chapter 558, Laws of 1901, but the amendment effected no change pertinent to the taxation of corporations such as relator.

Established judicial construction of this statute is to the effect that it imposes a per annum tax, computable upon the average amount of capital stock of domestic corporations, and upon the average amount of capital of foreign corporations, respectively, employed within this state during the tax year.

Relator is also subjected to a further franchise tax of five-tenths of one per centum upon its gross earnings within the State.

Tax Law, Sec. 184. See Appendix, p. 22.

PROPERTY TAXATION.

The real estate, except special franchises, of relator and other like corporations, is assessed for taxation by the same local assessing officers and subject to the same rules of valuation as the real estate of individuals.

Tax Law, Secs. 2, 3, 11, 21. See Appendix, pp. 13–17.

In so far as the railroad occupies or uses streets, highways, public places or public grounds, the privilege of such occupancy and use is denominated a special franchise, and the privilege and easement of such occupancy and use, together with all tangible property there maintained by or for it, are assessed for taxation by the state board of tax commissioners, subject to the like rules of valuation governing assessment of real property for taxation.

Tax Law, Secs. 2, 42. See Appendix, pp. 13–15, 18–20.

Tax for State, County, Town, School and Municipal purposes is imposed upon such valuations the same as upon the real estate of individuals.

Tax Law, Sec. 55. See Appendix, pp. 20–21.

The capital stock and personal property, including rolling stock of relator and other like corporations, is, like that of other corporations, subject to local assessment for taxation in the taxing district where its principal office is situate, and subject to taxation for all other than state purposes.

Tax Law, Secs. 12, 27, 31, 202. See Appendix, pp. 16, 17–18, 25–26.

The tax upon and for the right of corporate existence and capacity is assessed and imposed once for all, and required to be paid prior to the exercise of any corporate power in and about the location, building, maintenance or operation of any railroad.

Tax Law, Sec. 180. See Appendix, pp. 21–22.

The lease of a railroad carries with it the right of exercise of, and subject unto all limitations and restrictions upon, the franchises pertaining to the railroad so leased.

Railroad Law, Sec. 78. See Appendix, pp. 1–2.

The State tax on each dollar of valuation for the respective years for which the franchise tax here in question was imposed was as follows:

1900, Two and forty-nine one-hundredths mills (Chaps. 208 and 571 Laws of 1899); 1901, One and ninety-six one-hundredths mills (Chap. 421 Laws of 1900); 1902, One and twenty one-hundredths mills (Chap. 643 Laws of 1901); 1903, Thirteen one-hundredths of a mill (Chap. 615 Laws of 1902); 1904, Thirteen one-hundredths of a mill (Chap. 641 Laws of 1903). See Appendix, pp. 26–30.

The franchise tax imposed, computed upon relator's capital stock employed within this State, under section 182, and upon its taxable gross earnings under section 184, of the Tax Law, aggregate many times what would be the amount of the State tax, at the respective rates above mentioned, computed upon the amount of its taxable personal property, from which it is exempted by section 202 of the Tax Law.

Specification of Errors.

The errors relied upon for review and reversal of the judgments complained of are the following:

I.—In that the provisions of section 182 of the Tax Law of the State of New York, and the authority exercised thereunder by the Comptroller of the State of New York, were held valid in and for franchise taxation upon the capital of the said relator invested in the average number of its cars which were used by other common carrier railroad corporations outside of the State of New York in the

through carriage of persons and property from the State of New York, to other states, and vice versa, and in transportation of persons and property between points in respective states other than and over routes wholly outside of the State of New York, and that such franchise tax did not offend against the commerce clause, Article 1, Section 8 of the Constitution of the United States.

II.—In holding and deciding the said statute valid authority for franchise taxation upon the basis of the capital of the said relator invested inthe average number of its cars used successively and interchangeably by other common carrier railroad corporations outside of the State of New York under authority of and in the exercise of franchises granted to them respectively by respective states other than New York, and that the franchise tax thus computed and imposed did not impair the obligations of the contracts pertaining to the grant, acceptance and use of the respective franchises whereunder the said cars of relator were thus operated and used outside of the State of New York, and hence was not repugnant to Article 1, Section 10 of the Constitution of the United States.

III.—In holding and deciding the said statute valid authority for franchise taxation upon the basis of the capital of the said relator invested and employed in the average number of its cars used upon railroads in respective states other than New York State in the through carrying of persons and property from points in New York, Massachusetts, New Jersey or Pennsylvania, respectively, to points outside of such respective state, and vice versa, and between points foreign to said several states, all in the exercise of and under the authority of franchises granted by the respective states wherein the said operations were so carried on and that such franchise tax

did not impair the obligations of the contracts pertaining to such use of relator's cars by other corporations, and hence was not repugnant to Article 1, Section 10 of the Constitution of the United States.

IV.—In holding and deciding the said statute valid authority for and the exercise thereunder of said authority the valid imposition of franchise taxation by the State of New York upon the basis of the capital of relator invested in the average number of its cars which were delivered by relator to transportation corporations foreign to the State of New York, and used by them wholly within states other than New York, under authority of, and in the exercise of franchises granted by such other states, respectively, to corporations created by them, and that the said statute and the said tax imposed under its authority, did not operate to deprive relator of its property without due process of law, and did not deprive relator of the equal protection of the laws and hence did not contravene the provisions of the fourteenth amendment to the Constitution of the United States.

V.—In holding and deciding that franchise taxation prescribed by and imposed by the said Comptroller of the State of New York under the supposed authority of said statute, upon the basis of relator's capital invested in the average number of its cars by it used in the States of Massachusetts, New Jersey and Pennsylvania, respectively, in the exercise of franchises granted by those States, respectively, to corporations created thereby and domiciled therein, and by the latter leased to the said relator, all subject unto the regulation of and under the authority and protection of the public acts of such respective State, did not not offend against the provisions of the commerce clause, Article 1, Section 8 of the Constitution of the United States; and did not deny or refuse full

faith and credit to the public acts of such other state and therein did not contravene Article 4, Section 1 of the Constitution of the United States.

VI.—In holding and deciding the said statute valid authority of and for franchise taxation in and by the State of New York upon the basis of the capital of relator invested in the average number of its cars used by it in the States of Massachusetts, New Jersey and Pennsylvania in the exercise of franchises granted by those states, respectively, and leased to the said relator, and exercised by it in the carrying of commerce between points respectively within, and between points within and points without those respective states, and that therein and thereby the said statute did not impose burden upon or regulation of interstate and foreign commerce and did not impair the obligations of contracts pertaining to interstate and foreign commerce, and hence did not offend against the provisions of either Article 1, Section 8, or Article 1, Section 10 of the Constitution of the United States.

VII.—In holding and deciding that franchise taxation imposed by the said Comptroller of the State of New York under the supposed authority of said statute, upon the basis of the capital of said relator invested in the average number of its cars by it operated and used in the States of Massachusetts, New Jersey and Pennsylvania, respectively, in the exercise of franchise granted by those States, respectively, to corporations created thereby and domiciled therein, and by them leased to relator and by it exercised in commerce local to said respective States, as also in commerce between those respective States and other States, did not impair the obligations of the contracts pertaining to the grant, acceptance and use of the franchises granted by the said respective States, and hence did not therein offend against the provisions of

Article 1, Section 10 of the Constitution of the United States.

VIII.—In holding and deciding the said statute valid authority for franchise taxation upon the basis of the capital of the said relator invested in the average number of its cars used wholly outside of the State of New York, in the operation of railroads situate in other States, owned by corporations created by and domiciled within such other respective States, and leased to and operated by the said relator under authority of the franchises of its respective lessors, granted to them by the said States, respectively, and that such franchise tax did not impair the obligations of the said contracts of lease, and hence was not therein repugnant to Article 1, Section 10 of the Constitution of the United States.

IX.—In holding and deciding the said statute valid authority of and for and the exercise thereunder of said authority the valid imposition of franchise taxation upon the basis of the capital of the said relator invested in the average number of its cars used by relator in the States of Massachusetts, New Jersey and Pennsylvania, respectively, upon lines of railroad situate in and owned by corporations chartered by said respective states and leased by such corporations to and operated by the said relator, in the carrying of state and interstate commerce, and that such franchise tax did not deprive relator of its property without due process of law, and did not deny to relator the equal protection of the laws, and hence did not therein contravene the fourteenth amendment of the Constitution of the United States.

X.—In holding and deciding the said statute of the State of New York to be valid authority for, and the said authority of the Comptroller of the State of New York exercised thereunder to constitute valid imposition of the

said franchise tax imposed and computed upon the basis of the capital of the said relator invested in the average number of its cars, which, having passed out of the State of New York and out of the possession of the said relator, were operated and used by railroad corporations created by other states upon their railroads there situate, in common carrier transportation local to said respective states and between those and other states, and that such franchise tax thus computed and imposed did not constitute a burden upon or regulation of commerce among the several states, and did not impair the obligations of the contracts under which the said relator transferred and surrendered, and the said respective foreign corporations acquired and used the said cars, and did not impair the obligations of the contracts, inhering in, arising upon the grant, acceptance and use in of the franchises granted by them, respectively, and did not refuse full faith and credit to the public acts thereof, or otherwise offend against either Article 1, Section 8, or Article 1, Section 10, Article 4, Section 1, or the fourteenth amendment of the Constitution of the United States.

XI.—In holding and deciding the said statute of the State of New York to be valid authority for, and the said authority exercised thereunder to constitute valid imposition of the said franchise tax computed and imposed upon the basis of the capital of the said relator invested in the average number of its cars operated and used in the States of Massachusetts, New Jersey and Pennsylvania, respectively, and that such franchise tax thus computed and imposed did not constitute a burden upon or regulation of commerce among the several states or foreign commerce, or commerce within and domestic to such respective state, and did not impair the obligations of the contracts, arising upon the grant, acceptance and use of the franchises granted by them respectively, or of the

contracts whereby and whereunder relator thus operated in the said respective states under authority of said franchises, and did not refuse full faith and credit to the public acts of such other respective state, and hence that the said franchise tax thus computed and imposed did not contravene either Article 1, Section 8, or Article 1, Section 10, Article 4, Section 1, or the fourteenth amendment of the Constitution of the United States.

XII.—In so holding and deciding as therein and thereby to uphold and sustain the validity of the said statutory provisions and of the authority exercised thereunder in the computation and imposition of the said franchise tax as not constituting a burden upon or regulation of commerce domestic to states other than New York, as not constituting a burden upon or regulation of commerce among the several states or with foreign countries, as not impairing the obligations of contracts pertaining to commerce domestic to states other than New York, as not impairing the obligations of contracts pertaining to commerce among the several states and with foreign countries, as not impairing the obligations of contracts pertaining to the grant and acceptance and lease of franchises by and the exercise and use thereof within states other than New York, as not denying full faith and credit to the public acts of such other state, and as not depriving the said relator of its property without due process of law, and as not depriving relator of the equal protection of the laws, and hence denying to the said relator the relief, order and decree herein prayed for, and in rendering judgment against them for costs and disbursements in the said cause and proceeding.

INTRODUCTORY STATEMENT.

Twenty years of franchise taxation to and until the adjudications here presented for review.

Chapter 542 of the Laws of 1880, as originally enacted, and as amended by Chapter 361 of the Laws of 1881, imposed a specific tax as follows:

a. If the dividend or dividends made or declared amount to six or more than six per centum upon the par value of its capital stock, then the tax is to be at the rate of one-quarter mill upon the capital stock for each one percentum of dividend.

b. If no dividend be made or declared, or if the dividend or dividends made or declared do not amount to six per centum upon the par value of said capital stock, then the tax to be at the rate of one and one-half mills upon each dollar of a valuation of the said capital stock made in accordance with this act.

See Appendix, pp. 2–10.

Without specifically so declaring, the enactment assumed that jurisdiction to impose this specific tax inured to the State as against domestic corporations by reason of their creation by and domicil within the State, and as against foreign corporations, by reason of their doing business within the State.

As to domestic corporations, the fact of liability to the tax, or the measure of such liability, did not depend upon the fact of their using or employing any franchise or doing any business either within the State or elsewhere, or upon the employment of capital, or the amount of capital employed, within the State or elsewhere.

Foreign corporations doing business and employing

capital within the State were subject to the like specific tax upon their entire capital stock, without reference either to the character of franchise used or exercised within this State or to the amount of capital employed within this State.

The right of apportionment of the tax in such wise as to restrict the basis of computation thereof to the amount of the capital stock employed within this State was contended for and denied.

As to domestic corporations in

People *vs.* Home Ins. Co., 92 N. Y., 328.

People *vs.* Gold & Stock Tel. Co., 98 N. Y., 67, 73, 76, 77.

As to foreign corporations in

People *vs.* Equitable Trust Co., 96 N. Y., 387, 396–7.

People *vs.* Horn Siver Mining Co., 105 N. Y., 76, 84–5, 8.

The tax imposed was distinctively a tax upon the possession by the corporation of its corporate franchise, as distinguished from a tax upon the exercise of its franchise.

The tax had not in any case any reference to the fact, locality or character of employment of the capital, or to the fact or locality of transaction of, or character of the corporate business; or to the fact or amount of either gross or net earnings, except incidentally, in that presumably the fact and amount of dividends would be founded upon the fact and amount of net earnings.

The character of the tax was as defined in *People* vs. *Home Ins. Co.* (92 N. Y., 328; 134 U. S., 594), in which Ruger, *Ch. J.*, writing for the Court of Appeals, at page 338 said:

> "It was also undisputed that a State, in the exercise of its legislative power, has the right to impose

> taxes upon the business privileges and franchises of a corporation organized under its laws and from which alone it derives its corporate existence and secures protection in the prosecution of its business. In other words, it is admitted that among the legitimate subjects of State taxation is not only the property of individuals and corporations, but in case of corporations the very right of exercising the privileges granted to them by the State."

And Mr. Justice Field, writing for the Supreme Court (134 U. S., p. 599), said:

> "By the term 'corporate franchise or business,' as here used, we understand is meant (not referring to corporations sole, which are not usually created for commercial business) the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise."

Subsequently, in 1885, having noted that the tax thus imposed operated unjustly, in that the burden thereby laid upon the corporations subject thereunto was not graded with reference to their measure of use of the State's privilege and grant, the legislature not only provided that for the then future "the amount of capital stock which shall be the basis for tax * * * shall be the amount of capital stock employed within this State," but, in order to measureably rectify the injustice of the meantime imposition of the tax, upon the thereunto prescribed basis thereof, authorized and directed the Comptroller, upon application therefor, "to make, settle and adjust all accounts against such corporation * * * for all taxes and penalties arising under the third section of this Act, since the twelfth day of May, A. D. eighteen hundred and eighty-two, by taking as a basis for taxation the capital employed within this State."

See Appendix, pp. 10–13.

As was stated by Earl, *J.*, writing for the Court in *People* vs. *Horn Silver Mining Co.* (105 N. Y., 76, 87):

> "Then, for the first time, the basis for computing the tax was actually fixed by law at the amount of capital stock employed within the State."

And regarding the reasons upon which the legislature substituted this provision in place of one imposing the tax upon the entire capital wheresoever employed, that learned Judge further said (*id.*, 88):

> "The injustice of such a basis of taxation has finally been recognized by the legislature, * * * by the fourteenth section of the act of 1885 the comptroller was authorized and directed upon application to him of any corporation, to make, settle and adjust all accounts against such corporation, joint stock company or association, for all taxes and penalties arising under the third section of the act of 1881, since the 12th day of May, 1882, by taking as a basis for taxation the capital employed within the State by such corporation, association or joint stock company."

In the case of *People* vs. *Campbell* (88 Hun, 544), Putnam, *J.*, writing for the Supreme Court, General Term, Third Department (*Id.*, p. 546), states the facts presented, and conclusion announced, as follows:

> "The New York Central and Hudson River Railroad Company, for the years 1885, 1886, 1887, 1888, 1889, 1890 and 1891, made the annual report required by chapter 542, Laws of 1880, and the several acts amendatory and supplementary thereto, and paid the tax required by said statute on its franchise or business. It will be seen by an examination of its reports contained in the case, on which the annual franchise tax was computed, that it failed to state in either the amount of its capital stock employed within the State, as required by section 11 of chapter 542 of the Laws of 1880 (added by chapter 151, Laws of 1882), as amended by chapter 501, Laws of 1885.

The Comptroller, therefore, assessed the corporation for each year above mentioned upon its full capital stock, and the tax by him assessed was duly paid.

On or about November 29, 1893, in pursuance of the provisions of section 19 of chapter 542 of the Laws of 1880 (added by chapter 463 of the Laws of 1889), the said corporation applied to the Comptroller for a revision or readjustment of said franchise tax so assessed for each of the years above mentioned."

(*Id.*, p. 549):

"The statement from the records of the New York Central and Hudson River Railroad Company which the Comptroller received in evidence and which we think he had, in his discretion, a right to regard, as to the amount of the capital stock of the company employed out of the State during the years in question, showed that during each of said years a large number of freight cars were permanently occupied out of the State, and that the company also had a portion of its capital stock invested in the stock of foreign corporations and also in corporate bonds.

It does not require a discussion or citation of authorities to show that such part of the capital stock of the railroad company as was invested in freight cars permanently engaged out of the State was not subject to the franchise tax under the provisions of Chapter 542, Laws of 1880, and the acts amendatory and supplementary thereto (*Pullman's Palace Car Co.* vs. *Pennsylvania*, 141 U. S., 18; *Commonwealth* vs. *Del., L. & W. R.R. Co.*, 145 Penn. St., 96)."

(*Id.*, p. 550):

"We, therefore, think that the Comptroller was justified in making the revision he did of the tax assessed against the railroad company as far as it was assessed on that portion of the capital stock of the corporation invested in freight cars permanently engaged out of the State and in the stock of foreign corporations."

Car mileage was the basis of division between values, respectively, included in or excluded from the basis of

taxation, in each of the cases cited as authority for the conclusion announced.

(No. 586, P. R. 129, 137.)

The same rule of interpretation is to be applied to the language employed in a judicial announcement as to that employed in any other documentary or conventional expression, in that the words are to be viewed in the light of common knowledge which every one is presumed to possess concerning the subject-matter about which the words are spoken. The common course of railroad business as transacted at that time and for several decades preceding had been and was that shipments in car-load lots were carried, from point of shipment on one railroad to point of destination upon another railroad, by movement of the loaded car over whatever railroads or parts of railroads constituted and made up the route of travel from shipping point to destination. It was primarily consequent upon this method and course of business that freight cars of the owning company passed beyond its lines of road and beyond State lines to and upon and were thereupon used and employed upon the railroads of other companies, as well in the completion of the shipment thus effected, as also in the initiation and forwarding of other shipments to or toward the road of the company owning the car, and also meantime other use of the car by other railroad companies into whose hands it might adventitiously come. This method or course of business was so commonly known as perforce to impute to the Court in the use of the words "permanently engaged out of the State," the meaning not that specific individual cars were permanently out of the State, but that an average number thereof of the value found were thus "permanently engaged out of the State."

This legal view was accepted and acted upon by taxing officers, practically without question before the courts re-

garding its accuracy, during the ensuing ten years, and until the rule to the contrary was adjudged in the case at bar.

In People ex rel. Lackawanna Transportation Company vs. *Knight*, 75 App. Div., 164, applying the same rule to taxation of capital stock represented by vessels sailing upon the Great Lakes, Chase, Judge, writing for the Court (*Id.*, 167), says:

> "We do not see any distinction in principle between a case where property is employed continuously without the State and a case where property is in good faith employed without the State for a distinct part of the time or for a distinct portion of its mileage."

Again, in this case (No. 81 P.R., 44), the same Court, by the same Judge, says:

> "The balance of the assets consists of $15,230,186.06 for rolling stock, being such proportion of all relator's rolling stock as the mileage thereof without the State bears to the entire mileage of all such rolling stock; $100,000 for coal and supplies without the State; $115,089,533.01 for stock owned by the relator in foreign corporations, and $2,311,686 for that portion of the capital stock owned by the relator in a domestic corporation, which corresponds with the proportion of the assets of such domestic corporation used without the State.
>
> Under the decision in *People ex rel. Lackawanna Transportation Company* vs. *Knight* (75 App. Div., 164), the rolling stock without the State and the said coal and supplies are not capital employed within this State,"

and on review in the Court of Appeals (*id.*, p. 51), O'Brien, Judge, says:

> "The court below found that a certain portion of the relator's rolling stock, that is to say, its cars, both freight and passenger, was employed outside of the state, the proportion being estimated on the

mileage or wheelage basis at $15,230,186.06. The court excluded this item from the calculation on the authority of *People ex rel. Lackawanna Transptn. Co.* vs. *Knight* (75 App. Div., 164). It was there held that the term 'employed within state,' used in section 182, did not mean simply the legal *situs* of the property, and this principle was decided in other cases. (*People ex rel. Chicago Junction, etc., Co.* vs. *Roberts*, 154 N. Y., 1; *People ex rel. Washington Mills Co.* vs. *Roberts*, 8 App. Div., 201; affirmed on opinion below, 151 N. Y., 619.) It is obvious that since the relator is a great interstate railroad traversing the continent that a large proportion, or at least some, of its rolling stock must be always employed outside of the state. It may be that the *situs* of all the relator's property is in the state of its creation, but, as already remarked, the question is not where the *situs* is, but where the property is employed. It may be that various states through which the relator's railroad is operated impose taxes upon such part of its property as upon the basis adopted here is found to be employed in these states respectively, so we think that the learned court below was correct in excluding this item from the estimate of the relator's property employed within this state."

The majority of the court, however, concurred in the view announced by Haight, Judge, as set forth in No. 81, P. R. 49, and quoted at page 10 of this brief.

It is thus seen that the moving cause for the presentation of this question at this time is not by way of effort of the relator to overturn a twenty years' practical construction, and a twelve years' recognized and followed judicial construction, of the statute, as a means of escape from taxation sustained by such construction, but, on the contrary, its effort is to have judicial recognition of the accuracy of that practical and judicial construction which stood for so many years practically unchallenged.

BRIEF OF THE ARGUMENT.

I.

The subject-matter taxed, as herein complained of, is the use and exercise of the franchise, privilege and business of transportation of persons and commodities.

a. Ownership or possession of the corporate franchise to be or to do, do not subject the owner or possessor to the tax.

b. The tax is not imposed upon the franchise *per se* but upon the use thereof.

c. Exercise of the franchise is the foundation for imposition of the tax, and the average amount of capital stock employed is the basis of computation of the tax.

d. The use and exercise of the franchise, privilege or business of transportation thus taxed is that of carrying on commerce either intrastate, interstate or foreign.

II.

It is necessary to the power of taxation upon the use and exercise of a franchise, privilege or business:

1. That such use and exercise thereof be carried on within the territorial domain of the taxing sovereignty; and

2. That the franchise, privilege or business so there used and exercised be such as is within the organic prerogative of that sovereignty to tax the use of.

a. Transportation between respective points one thereof within and the other without, or *via* routes in part within and in part without, a respective state, is interstate or foreign commerce.

b. Refusal of observance of the rule of average for taxation on commerce employment, is discrimination against such commerce.

III.

Taxation of or upon the exercise of the privilege of commerce conducted in another state or computed upon the capital there so employed, whether such commerce be inter-state, foreign, or intra-state, transcends the jurisdiction of the taxing state, and thus takes property without due process of law, and denies full faith and credit to the public acts of such other state.

a. It is requisite to due process of law that the tribunal have jurisdiction of the subject matter of such process.

b. The State cannot by conferment of corporate charter powers to transact business (1) outside of its territorial domain or (2) of character outside the sphere of its governance draw to itself the power of taxation upon such exercise of the charter powers conferred by it.

c. The situs of exercise of the franchise pertaining to transportation upon and over any railroad is the situs of the railroad and of the franchise relating there .

d. Car movements or the thereby exercise of franchise cannot have an imputed situs

e. Taxation of exercise of franchise to do can only be imposed by the sovereignty in whose domain the work is done.

f. Local commerce is subject to local tax by the State wherein it is conducted.

g. Determination as to what tax the exercise of the occupation, privilege or business of intra-state commerce may be subject unto involves (1) giving full faith and credit to the public acts of the State whose local commerce it is, and (2) acceptance thereof as thus accredited as the sole basis of such determination.

h. The effect of the statute (Tax Law, Sec. 182), as adjudged by the New York courts, is to tax the corporate use and exercise in other States of the occupation, privilege and business of the local commerce of those States.

ARGUMENT.

I.

The subject matter taxed, as herein complained of, is the use and exercise of the franchise, privilege and business of transportation of persons and commodities.

In *People ex rel. N. Y. C. & H. R. R. R. Co.* vs. *Feitner*, 75 App. Div., 527; affd. without opinion, 174 N. Y., 532, the real estate of the Spuyten Duyvil & Port Morris Railroad Company had been assessed for taxation at $1,121,600. It possessed no personal property, but defendant Feitner and others, Commissioners of Taxes and assessments of the City of New York, assuming to value the property of the company for purposes of taxation of its capital stock and supposed surplus, and for that purpose, determined the value of the company's fixed property to be the sum of $1,483,500, and deducting from this the $1,121,600, assessed value of real estate, fixed the value of the capital stock and surplus liable to taxation for the year 1901 at $361,900.

The ground upon which this assessment was based is stated in the opinion of McLaughlin, *J.*, (75 App. Div. 529) by quotation from the Commissioners' return to the writ of certiorari, which is in part as follows :

> "This railroad was so situated as to necessitate a different method of valuation from that adopted in the case of an ordinary steam railroad only partly within the tax district. The whole of said railroad was within the tax district and within the jurisdiction of the defendants for purposes of taxation. It was used not for the ordinary purposes of a steam railroad, but to connect two sections of the lines of the New York Central & Hudson River Railroad Company's railroad and so enable that company to

> run its trains into the Borough of Manhattan in the City of New York. By its situation and construction, it was peculiarly adapted to the uses to which it was put and its use was essential to the successful entry into the heart of the City of New York by a railroad approaching the city along the easterly shore of the Hudson River."

and (*Id.* p. 530), Judge McLaughlin, writing for a unanimous court says :

> "All the property which the Spuyten Duyvil and Port Morris Railroad Company had at the time the assessment was made was included in its real estate, except its franchise, which the commissioners of taxes and assessments of the City of New York had no power to assess, the assessments upon that being made by other taxing officers under the authority of section 182 and section 184 of the Tax Law (Laws of 1896, chap. 908, as amd.)."

The franchises thus mentioned as taxed under Section 182 of the Tax Law were the indestructible, inheritable and alienable franchises which inhered in and pertained to the corporate property, improvement and use whereof constituted the corporate enterprise.

The distinction between these, and the franchises of corporate organization, existence and capacity, as regards pecuniary value thereof, is clearly presented by comparison of the foregoing with the obviously correct statement in the opinion of the learned Judge Earl, as Referee, in the Special Franchise Tax cases (p. 44 of pamphlet) as follows:

> "They mention the franchise to be a corporation. Such a franchise has very little cash value (*Detroit Citizens' Street Railway Company* vs. *Common Council*, 85 N. W. Rep., 96). The supply of these under general laws is unlimited. Any sufficient number of persons can organize any one of these corporations and thus potentially obtain all the corporate rights belonging under general laws to such a corporation—right to corporate existence, right to conduct the

corporate business, right to consolidate and to contract with other corporations, and all other rights, privileges and franchises which belong to the corporation as such under the laws. All these franchises and privileges are of little cash value, as they may be obtained *ad libitum* at small cost by the payment of the organization tax and the expense of drafting and filing the articles of incorporation. Hence they can play a very unimportant part in valuing these street franchises. They can have value only when the corporations have obtained rights in the streets for the exercise of their corporate powers and in valuing all the property of such corporations, such value is so unimportant that the law would not take much account of it. Of course, the State can arbitrarily tax the franchise to be a corporation, by special methods, but when an inquiry is set on foot as to the real value of such a franchise merely as such, it must be found to have but little more cash value beyond the cost of incorporation than the air we breathe."

These excerpts sufficiently exemplify that the legal rule and view, conform to the common sense rule and view, in according substantial value, not to the mere franchise of corporate being and capacity, to be had, once for all, for the full term of corporate life, upon payment of the prescribed per centum upon the authorized capital stock; but to the franchises which inhere in and pertain to the corporate enterprise, and which constitute vested rights, having the general attributes of property, including that of assignability, and having value according as they are fortuitously chosen and skillfully conducted; and that without regard to whether they are, or are not, employed and conducted by the corporation to which the State originally granted them.

(*a*) *Ownership or possession of the corporate franchise to be or to do, do not subject the owner or possessor to the tax.*

Notwithstanding the continued existence of the corpo-

ration, and continued existence and possession of the corporate capacity, powers, faculties and franchises with which it was at its creation endowed, if none of its capital is employed within this State during the tax year. Section 182 imposes no tax.

In *People ex rel. Singer Mfg. Co.* vs. *Wemple* (150 N. Y., 46), where the question presented was whether the amount of a foreign corporation's investment in real estate, under lease and not occupied by it, should, under Section 182 of the Tax Law, be deemed to constitute a part of its capital stock employed in this State, Bartlett, *J.*, writing for the Court, at page 49, says:

> "We are of opinion that the amount represented by the real estate was no portion of the capital stock employed within this State, even if the $900,000 was a part of the capital stock of the company; it was an independent investment, and was in no sense employed within this State in the transaction of the ordinary business of the relator. (*People ex rel. The Southern Cotton Oil Company* vs. *Wemple*, 131 N. Y., 64.) If at any time the whole or any portion of this real estate should be used by the relator in carrying on its business in this State, a different question would be presented, which need not now be considered."

In *People ex rel. Niagara River Hydraulic Co.* vs. *Roberts* (30 App. Div., 180), which the Court of Appeals "affirmed with costs on opinion below" (157 N. Y., 676), involving the question whether, as against a domestic corporation, its capital invested in substantially unproductive real estate, was, under Section 182 of the Tax Law, to be deemed "capital stock employed within this State," Landon, *J.*, writing for the Appellate Division, says:

> "The franchise tax is imposed upon domestic corporations because of their franchise. It is based upon their capital 'employed within this State' and graduated according to dividends earned. In respect to

foreign corporations, we do not grant them their franchises, but we permit them to do business here; and, as we should not accord them superior advantages over domestic corporations, we try to impose the same rate of taxation upon them, and thus we tax them upon their business, upon the same basis and scale. In *People ex rel. Singer Mfg. Co.* vs. *Wemple* (150 N. Y., 46), it was held as to a foreign corporation that the money, whether capital or surplus, which it invested in real estate here, not for the transaction of its ordinary business, but for rental, was not 'employed within the State,' within the meaning of the statute. If capital can be invested without being employed, the case before us seems to be a fair instance of it. Of course, the statute does not contemplate that a foreign corporation shall, in this respect, be more favored than a domestic one, and hence we must hold that the relator was not liable to the franchise tax."

The same principle was announced in *People ex rel. R.R. Co.* vs. *Morgan* (57 App. Div., 335), and by the Court of Appeals modified "as agreed upon by counsel, and as so modified affirmed, with costs, on opinion below" (168 N. Y., 672), wherein it is said:

> "This is not a tax upon property, but a tax upon a business done. It is an annual tax to be measured by an annual business done, or, in other words, by the appraised value of capital employed during an entire year.
>
> The capital must have been employed or else there is no tax. It must have been employed within the State. All the data going to fix the amount of the tax must be past transactions. Time of employment and amount employed are essential data to fix the amount of an annual tax upon a business with any degree of fairness. * * * It is not for the privilege to do business that the tax is imposed. The organization tax takes care of that, but it is the business actually done, and after it is done, and can be ascertained and measured, that this tax lights upon;

it is not for the privilege of doing business in the future. That also is provided for by the organization tax. It is for no privilege at all. The certificate of incorporation affords the privilege, and all the privilege, permitted or desired, to do business in this State."

The *Ft. George Realty Company* case was this:

An ancestor died leaving incumbered unimproved real estate, and the heirs organized a corporation, conveyed the property to it, taking shares of stock as payment. The corporation obtained a loan and applied the proceeds in discharge of the incumbrances, and against this corporation the Comptroller assessed a franchise tax which the Supreme Court, Appellate Division, in part affirmed and relator appealed.

The Court of Appeals, by Parker, *Ch. J.*, said:

"The question presented is whether the entire capital of relator is 'employed within this state' within the meaning of the provisions of Section 182 of the Tax Law. If it is, then relator must pay not only the organization tax—required when the corporation is organized—and the real estate tax—annually assessed against the property—but also a franchise tax.

"This property appears on the tax books of the City of New York as of the assessed value of $116,000. If Charles Francis Griffin was alive he would have to pay no other tax on the property, nor would his heirs at law if the title was still in them; but for convenience, as we have seen, they created a corporation to hold the title, the individual heirs at law taking stock for their proportionate shares. In organizing that corporation they had to pay an organization tax. The question now is whether they must in addition pay a franchise tax, and that depends upon the meaning to be given to the words 'employed within this state,' used in Section 182 of the Tax Law. That question we regard as having been settled so firmly by the decisions of this Court as to be no longer open for discussion" (p. 51).

After citing and quoting from the cases of *Singer Mfg. Co.* (150 N. Y., 46) and *Niagara River Hydraulic Co.* (157 N. Y., 676; 30 App. Div., 180) the conclusion announced is as follows:

> "It can be said in *this* case that if capital can be invested without being employed—and we have held in two cases that it can—this case is as good an illustration of it as can be found.
>
> "It follows that the authorities referred to require a reversal of so much of the order of the Appellate Division as is appealed from, with costs" (pp. 52-3).
>
> *People ex rel. Ft. George Realty Co.* vs. *Miller*, 179 N. Y., 49.

b. The tax is not imposed upon the franchise per se, but upon the use thereof.

Taxation imposed only in the event of use and exercise of corporate franchises, and measured by the stock capital employed, is not a tax on such franchise as is embraced in corporate existence or corporate capacity, but is solely a tax upon such franchises as are embraced in corporate activity.

Taxation imposed only in the event of use and exercise of corporate franchises, and measured by the stock capital employed, is taxation of and upon the franchises to do, and not of or upon franchises to be.

Taxation imposed upon and by reason of and only in the event of the use and exercise of corporate powers, and measured by the stock capital thus employed, is purely and simply a tax upon corporate activity, and in no sense a tax upon mere corporate being or capacity.

(c) Exercise of the franchise is the foundation for imposition of the tax, and the average amount of capital stock employed is the basis of computation of the tax.

The Court of Appeals, by Bartlett, *J.*, says:

> "The relator is a domestic corporation. * * * In the case of relator, where its principal business was conducted outside of this State, it became the duty of the comptroller to ascertain the amount of its capital stock employed within this State (Ch. 501, Laws of 1885, Sec. 11), for the purpose of computing the franchise tax."
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> *People ex rel. U. V. Copper Co.* vs. *Roberts*, 156 N. Y., 586, 587, 591.

And again by Werner, *J.*, the following:

> "The relator is a domestic corporation owning and operating a system of cable and telegraph lines extending from this State into other states and countries" (p. 434).
>
> "It is apparent, of course, that this section applies to two classes of corporations. In the first class are those that declare and pay dividends of six per centum or more upon their capital stock; and in the second class are those that declare and pay dividends of less than six per centum upon their capital stock. The tax upon corporations in the first class is 'to be computed upon the basis of the amount of its capital stock employed within this state,' while the tax upon corporations in the second class is 'upon such portion of the capital stock at par as the amount of capital employed within this state bears to the entire capital of the corporation.' It will be observed that in either case the tax can only be based upon the capital stock employed in this State, although the methods for ascertaining the amount thereof are different" (p. 438).
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> *People ex rel. Com. Cable Co.* vs. *Morgan*, 178 N. Y., 433.

Supreme Court, Appellate Division, Third Department, by Merwin, *J.*:

> "It seems to me to be reasonably clear that a considerable portion of the capital of the relator was employed in this State, within the meaning of the

statute. That being so, it only remains to apply the rule for ascertaining the amount which has been quite definitely laid down by the Court of Appeals, that the capital of a foreign corporation employed within this State is represented by the actual value of its property within this State, whether in money or goods or other tangible things. * * *

"In arriving at the amount, the average amount of securities held and used in this State may, I think, be considered."

People ex rel. N. E. Loan Co. vs. *Roberts*, 25 App. Div., 16, 19, 20. (Affirmed on opinion below, 156 N. Y., 688.)

The same Court, by Kellogg, *J.*:

"Time of employment and amount employed are essential data to fix the amount of an actual tax upon a business with any degree of fairness, and I think the Legislature, in framing this Franchise Tax Law, had this in mind" (p. 337).

"This tax, by the wording of the statute, is to be annual. The relator must pay annually" (p. 338).

"The proper basis is the volume of business done spread out over twelve months, and this is easily determined by average in case the time is short of twelve months. That the proper method of reaching the amount of capital employed is by average is not only supported by sound common sense, but by authority" (p. 339).

People ex rel. Brooklyn R. T. Co. vs. *Morgan*, 57 App. Div., 335. (Affd. on opinion below, 168 N. Y., 672.)

In the case of *People ex rel. Mutual Trust Co.* vs. *Miller*, 177 N. Y., 51, relator began business six days prior to the end of the tax year. The Comptroller taxed it upon the same basis as if it had been engaged in business during the entire tax year. The Court of Appeals adjudged the Company taxable on its employed capital for only the pro-

portionate part of the tax year during which it carried on its business.

Vann, *J.*, writing for the Court, said:

> (p. 54) "The tax under consideration is not imposed upon property but upon a privilege. It is not imposed upon the privilege of becoming a corporation, for that would be an organization tax, payable but once for the entire period of corporate existence. It is imposed 'for the privilege of exercising' the corporate franchise, and is measured by the value of the investment made and used in carrying on the corporate business. It is an 'annual' tax, imposed 'annually,' as the statute expressly provides, for the privilege of exercising, not of possessing, a corporate franchise. This privilege was used by the relator for only six days during the fiscal year in question. It could not exercise its franchise for the entire year, because the state did not bring it into existence until the year had nearly expired. The consideration for the tax is the privilege of carrying on business, yet the relator, according to the requirement of the Comptroller, was compelled to pay for a privilege that it did not have and could not exercise during the greater part of the period for which the tax was laid. It used the privilege for only six days, but it is taxed for using it 365 days, during 359 of which it did no business and enjoyed no privilege. An annual tax is a tax reckoned by the year the same as annual rent or annual interest. An 'annual' tax imposed 'annually,' means a tax that is imposed once a year, computed by the year. If a trust company does not commence business until six days before the fiscal year ends, or if it ceases to do business six days after the year begins, the tax for doing business by the year requires apportionment. While the legislature did not so provide in express terms, it is a fair and reasonable implication from the words used that such was its intention. When by section 182 of the Tax Law it imposed an annual tax payable annually upon every corporation of a certain class, to be computed upon the basis of the amount of its capital stock 'em-

ployed within the state' during the year, it did not say expressly that the assessment should be determined by the *average* amount of capital so employed, but we held that this was what was necessarily meant (*People ex rel. Brooklyn Rapid Transit Co.* vs. *Morgan*, 57 App. Div., 335; 168 N. Y., 672). Adopting the opinion below, we said: 'This is not a tax upon property, but a tax upon the business done. It is an annual tax to be measured by an annual business done, or, in other words, by the appraised value of capital employed during an entire year. The capital must have been employed or else there is no tax. It must have been employed within the state. All the data going to fix the amount of the tax must be past transactions. Time of employment and amount employed are essential data to fix the amount of an annual tax upon a business with any degree of fairness * * *.'"

We may assume that the question is not free from doubt, for we cannot unite in judgment upon it; but serious doubt in a case of taxation should be resolved in favor of the taxpayer. (*Matter of Harbeck*, 161 N. Y., 211, 217; *Matter of Fayerweather*, 143 N. Y., 114, 119; *Powell* vs. *Tuttle*, 3 N. Y., 396, 401.) A statute which levies a tax is to be construed most strongly against the government and in favor of the citizen. The government takes nothing except what is given by the clear import of the words used, and a well-founded doubt as to the meaning of the act defeats the tax. (Sutherland on Statutory Construction, 458; Black's Interpretation of Laws, 326; Cooley on Taxation, 200.)

We think the construction adopted is fair to the government and just to the citizen, for it gives the former full payment for the time the franchise was exercised, and takes from the latter nothing but what it impliedly agreed to pay when it accepted the franchise."

d. The use and exercise of the franchise, privilege or business of transportation thus taxed is that of carrying on commerce either intrastate, interstate or foreign.

The general unrestricted power to contract for the transportation of persons and property, embraced the power not only to make contracts at places foreign to this State, but also to make contracts for such transportation to and from points and *via* routes in foreign states and countries.

Bank of Augusta vs. Earle, 13 Pet., 519.

Mr. Chief Justice Taney:

(pp. 588-591.) "The charter of the Bank of Augusta authorizes it, in general terms, to deal in bills of exchange; and consequently, gives it the power to purchase foreign bills as well as inland; in other words to purchase bills payable in another State. The power thus given, clothed the corporation with the right to make contracts out of the State, in so far as Georgia could confer it.

"Every power, however, of the description of which we are speaking, which a corporation exercises in another State, depends for its validity upon the laws of the sovereignty in which it is exercised; and a corporation can make no valid contract without their sanction, express or implied. And this brings us to the question which has been so elaborately discussed; whether, by the comity of nations and between these States, the corporations of one State are permitted to make contracts in another.

"It has, however, been supposed that the rules of comity between foreign nations do not apply to the States of this Union; that they extend to one another no other rights than those which are given by the Constitution of the United States; and that the courts of the general government are not at liberty to presume, in the absence of all legislation on the subject, that a State has adopted the comity of nations towards the other States, as a part of its jurisprudence; or that it acknowledges any rights but those which are secured by the Constitution of the United States. The court think otherwise. The intimate union of these States, as members of the same great political family; the deep and vital interests which

bind them so closely together, should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship, and kindness towards one another, than we should be authorized to presume between foreign nations. And when (as without doubt must occasionally happen) the interest or policy of any State requires it to restrict the rule, it has but to declare its will, and the legal presumption is at once at an end."

It may perform such contracts either by the aid of other common carriers, or by lease or other control and operation of railroads, or other transportation facilities, situate without the State.

Railroad Law, Section 78. See Appendix, pp. 1-2.

Thus in *Day et al.* vs. *O. & L. C. R. R. Co.*, 107 N. Y., 129, complainants sought to restrain defendant company from using its net earnings for the purpose of carrying out the terms of a lease executed to it of a railroad in another State.

Danforth, *J.*, at page 140, said:

"It is next argued for the respondents that the arrangement expressed through these instruments, so far as the Ogdensburg & Lake Champlain Railroad Company is concerned, is beyond the capacity and power of that corporation. We have seen that the Vermont Railroad Company had corporate powers, and among those expressly given by its charter is a power to lease its road. It had, therefore, contracting capacity, and was a good party to deal with. The Ogdensburg & Lake Champlain Railroad, on its part, lacked no power expressly given by statute to similar corporations in this State, nor any which, as incident and necessary thereto, might enable it to carry on the objects of the incorporation. Among other statutes to which it might appeal was one 'authorizing railroad companies to contract with each other.' (Laws of 1839, chap. 218.) Under this act it might lawfully agree 'with any other railroad corporation' for the use of its road in any manner not 'inconsistent with

the provisions of the charter of the corporation whose railroad is to be used under such contract.' The contract in question is not affected by the limitation expressed in the act, and unless we are to imply into it another restriction and say that its operation must be confined to contracts with roads operating in and under the laws of this State, the lease must be held valid between the parties. We see no reason for such restriction, nor any principle of public law which requires it. We are not at liberty to create it. It would be legislation, not construction. A corporation given capacity to contract may exercise that capacity with any party in or outside the limits of the State, unless the law-making power of that other State forbids. (*Bank of Augusta vs. Earle*, 13 Peters, 519.) Our own statutes and the interpretation given to them by the courts are to that effect. (*Woodruff vs. Erie R. Co.*, 93 N. Y., 609; *In re N. Y. L. & W. R. R. Co.*, 99 *id.*, 12; *In re Peter Townsend*, 39 *id.*, 171; *In re Staten Island Rapid Tr. Co.*, 103 *id.*, 251.) In this case there is no such prohibition."

Indeed the comity of such other state or country, relied upon as the foundation of this authority for extra-territorial operations and service, is but the counterpart of the comity extended by this State to foreign corporations.

In *Matter of N. Y. L. & W. Ry. Co.*, 35 Hun, 220, Barber, *J.*, at page 227, said:

"It is now contended by the appellant that this act of the lessor corporation is illegal and in excess of its legitimate power, being in effect a surrender of its franchise and is contrary to public policy, and for that reason it should be held as a matter of law, that the petitioner is incapacitated from exercising the right of eminent domain conferred upon it by the legislature, and that the court should dismiss this application upon these grounds. Without the consent of the legislature the lease would be invalid as an unauthorized act on the part of the lessor cor-

poration. It has, however, been adjudged that power has been conferred on railroad corporations organized under the general laws of this State, to lease their roads and property and transfer the management and operation of the same to another railroad corporation. (Laws of 1839, chap. 218; *Woodruff vs. Erie Railway Company*, 93 N. Y., 616; *People vs A. and Vt. R. R. Co.*, 77 id., 234; *T. & B. R. R. Co. vs. B. H. T. and W. R. Co.*, 86 id., 107; *Foster vs. N. Y. C. & H. R. R. Co.*, 46 id., 644.) The circumstance that the term of the lease is during the corporate life of the lessor rather than for a shorter period, does not distinguish the case in principle from those just cited. The enabling act places no limitation as to the length of the term for which agreements of this character may be made. Neither is the lease invalid, for the reason that the lessee is a foreign corporation. There is no provision in the act prohibiting a lease by a railroad company organized under the laws of this State to a foreign corporation, on the contrary, the language of the statute is sufficiently broad to embrace them, and so far as the consent of this State is necessary to make them competent to accept a lease and assume the control and management of a railroad corporation organized under our laws, the language of the statute is very comprehensive in this particular, and permits any railroad corporation to contract with another railroad corporation for the use of their respective roads, and thereafter to use the same in such manner as may be prescribed in such contract. The statute received this construction in the case of *Ogdensburg, etc., R. R. Co.* vs. *The Vermont, etc., R. R. Co.* (16 Abb. (N. S.), 249), and we concur in the views there expressed.

"It is a cherished policy of this State to favor and facilitate interstate commerce, and to invite the trade and traffic of other communities over our own lines of transportation, inducing merchants to seek a market in our towns and cities. To effect this purpose is one of the aims of the enabling act of 1839. The roads of the lessor and lessee, when run in connec-

tion, make a continuous line between two of the most widely separated and important cities and harbors in the State, the route also commands, in addition, a large local coal traffic, in which trade the general public are interested and benefitted. By the laws of comity a foreign corporation organized under the laws of another State can, within the jurisdiction of this State, exercise such corporate powers and franchises as are conferred upon it by the law of its creation, unless prohibited by the laws of this State. This privilege is conferred upon corporations as freely and fully as it is upon citizens of another State. Under this rule foreign corporations can do in this State, within the limit of their charter powers, precisely what a domestic corporation can lawfully do."

In *Matter of Townsend*, 39 N. Y., 171, Woodruff, *J.*, writing at page 175, said:

"There is nothing, then, in the Constitution, that requires that the right to construct a railroad or a canal, or other public work, shall be conferred, and only conferred, upon our own citizens, or upon a corporation organized for the purpose, or upon a corporation specially created by the legislature itself. That is subject to legislative discretion.

Nor is there any thing in the Constitution which prescribes what control over the subject, after the appropriation to the public use, the legislature shall retain to itself, in order to secure the contemplated public benefits. That is left to the wisdom of the legislature. There are general rules of law, which may be invoked to prevent abuses, even though the use be not guarded by any express reservation of visatorial powers.

In this view, there is no constitutional inhibition which restrains our legislature from exercising the right of eminent domain, and condemning land to the public use, and employing, as an instrument to carry the appropriation to the public use into effect, an individual or a copartnership of individuals residing in this or in another State, nor from, in like manner,

employing a corporation created by another State, for the like purpose.

The example cited to us, in which the New York and New Haven Railroad Company, incorporated by the State of Connecticut, are authorized to construct their railroad through Westchester county, is an illustration, the legality of which cannot, I think, be questioned. And instances might be multiplied in which railroads have been constructed in part through or in States other than the State of their incorporation.

The act of our legislature authorizing such corporations to do the act, not only recognizes their legal existence, but, *per se*, makes them, in contemplation of the laws of this State, corporations *pro hac vice;* and their acts, dohe in pursuance of the authority, will be, not by *comity* alone, but by *law*, corporate acts."

II.

It is necessary to the power of taxation upon the use and exercise of a franchise, privilege or business:

1. That such use and exercise thereof be carried on within the territorial domain of the taxing sovereignty; and,

2. That the franchise, privilege or business so there used and exercised be such as is within the organic prerogative of that sovereignty to tax the use of.

The State grants the privilege of exercising a public franchise, and, in consideration of that grant, exacts from those who accept and avail themselves thereof, payment, to be computed upon the basis of the amount of capital

employed in the exercise of that franchise within the State.

If and when, consequent upon petitioner's exercise of the charter capacity and power vested in it at its creation, of acquiring the right to operate upon and over, and to order, direct or permit its movable equipment to be operated upon and over, lines of railroad situate in other States, territories and dominions, in the use and exercise of franchises granted by them, respectively, and, in the economical and necessary course of such business, petitioner's movable equipment is used, as a whole and interchangeably, upon and over lines of railroad within and those without this State, the State imposes and exacts payment of its franchise tax computed upon the basis of the entire amount of petitioner's capital stock thus employed, such imposition and exaction constitutes either a regulation of and burden upon the use and exercise in said other States, territories and dominions, of the franchises granted by them, respectively, or imposes and exacts unequal and oppressive burdens in respect of petitioner's use and exercise in the State of New York of the corporate franchises granted and vested by that State.

The business transacted and the functions exercised in and by movements of relator's cars outside of this State are primarily those commanded and compelled by the Federal Government in its power to regulate inter-state commerce.

Incident to the cars of relator going beyond the limits of this State, and out of the custody of relator, the railroad companies which have obtained possession of them employ them upon their railroads, under authority of the franchises granted to them by the States in which they operate, and these cars are thus used both in traffic local to such roads, and in their interchange traffic with other railroad companies and other railroads; such traffic being as well in commerce local to respective States as also in

inter-state commerce; and relator is without power to either prevent or control such use of its cars, or to know the extent to which such use consists of commerce local to respective States, or of that which is inter-state. In this manner the proven average portion of relator's cars are employed by foreign corporations upon their railroads outside of this State, and in the exercise of franchises granted by the States wherein they are thus employed, to corporations created by and domiciled within those respective states.

If and so far as such exercise of franchises affords warrant for State taxation, computed upon the basis of the capital employed therein or otherwise, and as well regarding such exercise of franchises as is involved in the portion of car movements, which is outside of this State, in and by way of completion of transportion beginning in this State, or beginning of or carrying forward of acts of transportation completed in this State, as also regarding such exercise of franchises as have regard to transportation wholly outside of this State, the right and power of State taxation is exclusively that of the respective States wherein the said cars are thus employed.

The Delaware Railroad Tax, 18 Wall., 206, 232.

Erie Railroad Co. vs. *Pennsylvania*, 158 U. S., 431, 436.

a. Transportation between respective points one thereof within and the other without, or via routes in part within and in part without, a respective state, is interstate or foreign commerce.

The use of franchise here taxed is described by Judge Haight, as follows:

"The rolling stock of the relator is used in this State and outside of the State; that is, cars are loaded at some point in the State, as for instance in the City

of New York, and run over the relator's road to some other point, say, the City of Buffalo. They then are transferred on to other roads and are run to points outside of the State where they are unloaded and then reloaded and returned to this State. The entire mileage includes that travelled in this State as well as that out of the State; this, with the distance travelled outside of the State and the total value of the stock, furnishes the proportion upon which the computation is made.

The question is as to whether this stock is taxable under the statute. The relator is a domestic corporation. It owns the rolling stock. It is used upon its lines of railroad in this State. True, the cars are transferred on to other roads and are run outside of the State for the purpose of facilitating the transportation of persons and freight without change of cars or of breaking bulk; but the use of the cars outside of the State is but temporary, for they are returned as soon as reloaded and are again used in the transportation of persons and property within this State" (81 P. R., 49).

We respectfully submit that the words quoted constitute a clear, conspicuous and unequivocal statement of occupation and business of interstate commerce transportation pure and simple. The thing taxed is the use and exercise of that occupation, business and privilege. The basis of computation of the tax includes as well the average capital thus employed out of the State as that so employed within the State.

That portion of such use and exercise of privilege which is outside of this State is not taxable by this State because beyond its territorial jurisdiction. Such use and exercise of privilege, as well within as without this State, is that of interstate commerce, and for that reason is not subject unto the taxing power of the State.

State, etc. vs. *Knight*, 192 U. S., 21, 26.

b. Refusal of observance of the rule of average for taxation on commerce employment, is discrimination against such commerce.

Refusal of observance of such rule of per annum average of capital as the basis of assessment where the capital is employed in such commerce constitutes discrimination prejudicial to such commerce, and is thus violative of the commerce clause and the due faith and credit clause of the Federal constitution.

Judicial construction and decision recognize and observe the rule that corporations other than those engaged in interstate and foreign commerce, and employing a portion of their capital within this State and a portion thereof outside of this State, are to be taxed in respect of only so much of their capital as is employed within this State.

People ex rel. Loan Co. vs. *Roberts, supra.*

Imposition of tax, based upon the assumption that the exercise of privilege in other States, in and about transportation beginning or ending in this State, is in such wise incident to the business conducted in this State, that the average capital stock thus employed outside of the State is nevertheless employed within it, and to be included in the basis of the computation of the tax, is a discrimination against interstate commerce, violative of the commerce clause of the Federal Constitution, and a deprivation of the equal protection of the laws, and thus violative of the Fourteenth Amendment of the Federal Constitution.

That the car mileage, respectively, (*a*) upon the lines of this company and of other companies within this State, and (*b*) upon lines foreign to it and without the State, *prima facie* affords a just basis of apportionment of its average total of mail, express, passenger, baggage and freight cars continuously employed by other corporations without the State, and that the road mileage operated by

it, respectively, within and without the State affords a just basis of apportionment of its average total equipment continuously employed by it, respectively, within and without the State, is affirmed by this Court in numerous cases, of which we cite the following:

State Railroad Tax Cases, 92 U. S., 575.
Western Union Tel. Co. vs. *Massachusetts*, 125 U. S., 530.
Pullman's Palace Car Co. vs. *Pennsylvania*, 141 U. S., 18.
Maine vs. *Grand Trunk Ry. Co.*, 142 U. S., 217.
Charlotte, etc., R.R. Co. vs. *Gibbs*, 142 U. S., 386.
Columbus Southern Ry. Co. vs. *Wright*, 151 U. S., 470.
Pittsburgh, etc., Ry. Co. vs. *Backus*, 154 U. S., 421.
Cleveland, etc., Ry. Co. vs. *Backus*, 154 U. S., 439.
Adams Ex. Co. vs. *Ohio*, 164 U. S., 194; s. c., 166 U. S., 185.
Am. Refrig. Transit Co. vs. *Hall*, 174 U. S., 70.
Union Refrigerator Transit Co. vs. *Kentucky*, 199 U. S., 194.

The measure of use within the State, of the franchise granted by it, is the same in the case of one who employs a capital of one million wholly within the State, as in that of one who employs a capital of two millions, of which a permanently and definitely identified and specified one-half, or an average of one-half, is employed within the State, and the other one-half employed without the State.

Recognition of the rule of average as a guide in and limitation upon imposition of this tax upon capital stock employed otherwise than in interstate and foreign com-

merce, and refusal of recognition and observance of such rule of average in the imposition of taxation upon capital stock employed in interstate and foreign commerce, is a discrimination against such commerce.

The amount of capital employed in the State is not increased or diminished by the impossibility or impracticability of identification of specific cars which, from time to time, are or are not embraced within the amount there employed.

A tax computed upon an amount in excess of the average amount of such capital employed within the State at any one time within the tax year, is afforded no support by the fact, either presumed or established, that by constant process of movement and interchange thereof each and every individual car is present in and used within the State during some portion of the tax year.

Where, by reason of constant movement and interchange of locomotives, cars, or other movable equipment of a railroad corporation between its road mileage within and that without this State, and between its road and the roads of other corporations situate wholly without this State, a defined proportionate share of the total, though composed of constantly changing specific items thereof, is continuously situate and employed outside this State, the value of such proportionate share thereof constitutes no part of "the amount of its capital stock employed within the State." Relator's freight car equipment, consisting of approximately sixty thousand cars, severally constantly moving within, and from, and without, and into this State, in such manner as to render impracticable the making or furnishing of data regarding specific cars, or numbers thereof, which may or may not have been employed within the State at some time during the tax year, but of which relator is able to and does have and furnish data showing the average amount thereof employed within this State during said year, affords no reason for imposing the

tax in respect thereof upon any other basis than that of the average amount thereof employed within this State during said tax year.

A tax computed and imposed upon the basis of the aggregate value of a total equipment, an average of five-ninths whereof is continuously used and employed by others than the owner wholly outside this State, and an average of one-eighth of the remainder whereof is continuously used and employed by the owner upon its leased road mileage wholly outside this State, is not a tax "computed upon the basis of the amount of its capital stock employed within this State."

The authorized basis of computation has no reference to the question whether "the amount of its capital stock employed within this State" consists in and is represented by, and its franchise exercised by means of, the same items of property throughout the tax year, or by wholly different items of property each successive day in the tax year; or to the extent or degree to which its employed capital may partake of either of these characteristics.

"The amount of capital stock employed within this State" during the tax year, and from day to day during that year, is in no wise augmented or swollen by the fact that the defined proportionate share thus employed is composed of constantly changing specific articles or items, part and parcel of a larger aggregate number of like articles or items of property, the balance whereof are not concurrently there employed.

III.

Taxation of or upon the exercise of the privilege of commerce conducted in another State, or computed upon the capital there so employed, whether such commerce be interstate, foreign, or intra-state, transcends the jurisdiction of the taxing State, and thus takes property without due process of law, and denies full faith and credit to the public acts of such other State.

The power of taxation cannot embrace either person, property or business having their *situs* outside the taxing State. Jurisdiction of the person carrying on business or exercisng privilege in the State of his domicile and in other States, cannot draw to the domiciliary State the power of taxation of business done or privilege exercised in other States. The territory of the sovereignty in which the business is done, or the privilege exercised, constitutes the *situs* of such transaction of business or exercise of privilege; such *situs* is matter of fact and not matter of fiction or imputation. Power and jurisdiction to tax the use and exercise of that portion of privilege exercised or business transacted within the domiciliary State does not carry with it the power or jurisdiction of taxation of the privilege exercised or business transacted outside of the territorial sovereignty of that State. The power and jurisdiction of *ad valorem* taxation of tangible property, having its *situs* in fact or imputed, within the domiciliary State of the owner of such property, does not draw to or carry with it the power and jurisdiction of taxation upon the business transacted or privilege exercised outside of said domiciliary State, even though in the carrying on of

such business and the exercise of such privilege the aforementioned tangible property is used and employed outside of such State. Transportation service consisting of continuous transportation either from a point in one State to a point in an adjoining State, or from a point in one State through one or more other States to a point in another State, involve in each case, in each State thus in whole or in part traversed, the exercise of privilege granted or accorded by such individual State. The privilege exercised in each State is as primary as that exercised in any other. The exercise of the privilege in one State is in no sense by virtue of or under authority of the exercise of privilege in the other State. The power and jurisdiction of taxation as to each is confined to and does not extend beyond the line of its territorial sovereignty.

a. It is requisite to due process of law that the tribunal have jurisdiction of the subject matter of such process.

The taxing authorities had jurisdiction of the person of the corporation taxed in *Phila. Steamship Co.* vs. *Pennsylvania*, 122 U. S., 326; *Louisville, &c., Ferry Co.* vs. *Kentucky*, 188 U. S., 385; *Del., L. & W. R. Co.* vs. *Pennsylvania*, 198 U. S., 341; *Union Refrigerator Transit Co.* vs. *Kentucky*, 199 U. S., 194. They did not, however, have jurisdiction of the subject matter of the tax, and, therefore, the imposition of the tax was adjudged unauthorized and void.

Absence of congressional regulation of, or restraint or burden upon, interstate commerce, constitutes no warrant for State regulation, restraint or burden thereof. Upon like principle, absence of State regulation of, or restraint or burden upon, commerce local to such State, constitutes no warrant for another State to exercise extra-territorial

jurisdiction, whereby to impose such regulation, restraint or burden.

The mere fact that a State grants and continues corporate life and capacity to a body corporate of its creation, constitutes no warrant for taxation by that State of such corporation's tangible property having its *situs* beyond the territorial jurisdiction of that State, or of the corporation's capital stock invested in that property (*Del., L. & W. R. Co.* vs. *Pennsylvania*, 198 U. S., 341); nor for taxation of or upon franchises owned by such corporation which were granted by authority foreign to, and have their *situs* outside of, the territorial jurisdiction of such State (*Louisville & J. Ferry Co.* vs. *Kentucky*, 188 U.S., 385); nor of franchises owned by such corporation, but which were granted to it by the United States (*California* vs. *Pac. R. Co.*, 127 U. S., 1); nor of cars owned in excess of the average number thereof employed in the taxing State (*Union Refrigerator Transit Co.* vs. *Kentucky*, 199 U. S., 194).

The reason why the State of Pennsylvania could not tax the D., L. & W. Co.'s coal having its *situs* in the State of New York and Illinois, or its capital stock invested therein, and why the State of Kentucky could not tax the L. & J. Ferry Co.'s Indiana franchise; or the Refrigerator Co.'s cars, in excess of the average number thereof employed in that State; was not in either case that the property was taxed in other respective States, but, that it was in each case beyond the taxing power of that State.

b. The State cannot, by conferment of corporate charter powers to transact business, (1), outside of its territorial domain, or, (2), of character outside the sphere of its governance, draw to itself the power of taxation upon such exercise of the charter powers conferred by it.

In case where a state creates a corporation with corporate capacity and power to own, lease, maintain and

operate railroads, and by means thereof transport persons and property both within and without the territorial jurisdiction of such state, and upon such creation thereof imposes and exacts, once for all, the tax for and upon such corporate existence, capacity and power for the full term of corporate life, and where, in the exercise of such corporate capacity and power, such corporation employs its capital in the use and exercise of the franchises granted by other respective States, Territories and Dominions, to therein transport persons and property constituting and pertaining to their local, interstate and foreign commerce, the state which created such corporation has no jurisdiction to impose and exact from it a franchise tax computed upon the basis of the capital of such corporation in manner aforesaid employed in such other respective States, Territories and Dominions.

> "The State power of taxation extends in general to all property, real or personal, having an actual *situs* within the state, irrespective of the residence of the owner. The state may not only tax property within its limits, but the business and occupation of its citizens, and the franchises of domestic corporations; and when it permits foreign corporations to carry on business in the state, it may ordinarily subject the privilege to such taxation as it may deem expedient. In short, the power of state taxation is coextensive with the subjects of taxation, and the state may define the subjects, provided only that the property, privilege, or right upon which the tax is imposed is within the jurisdiction."
>
> *People ex rel. P. R.R. Co.* vs. *Wemple*, 138 N. Y., 1, 9.

> "The jurisdiction to tax foreign corporations under Chap. 542 of the laws of 1880, as amended by Chap. 501 of the laws of 1885, and the subsequent amendments, depends upon the existence of two concurring conditions, namely, that the corporation sought to be

taxed shall be 'doing business' in this state, and, second, that its capital or some portion thereof, shall have been 'employed within this state.'"

People ex rel. Chi. Junc. Co., etc., vs. *Roberts*, 154 N. Y., 1, 2.

c. The situs of exercise of the franchise pertaining to transportation upon and over any railroad, is the situs of the railroad, and of the franchise relating thereto.

As regards the question of taxability the *situs* of the franchise is the *situs* of the exercise and use of the franchise and of the business which consists of the use and exercise of the franchise.

The use and exercise of the franchise, occupation, privilege or business cannot have a *situs* either *de facto* or imputed elsewhere than in the jurisdiction in which the business is conducted.

De facto or imputed *situs* of the physical property employed in such service does not draw with it the *situs* of the use or exercise of occupation, privilege or business in which the property is employed.

The corporate franchises used and exercised within the State, by domestic surface steam railroad corporations, are those which the State has granted and vested in and by charters authorizing the building, maintenance and operation of railroads within the State.

As it is the peculiar and sole province of the United States to prescribe what burdens the use and exercise of the occupation, privilege or business of interstate and foreign commerce shall be subject unto, so also, for like reason and upon like principle, it is the peculiar and sole province of each State to prescribe what burdens the use and exercise of the occupation, privilege and business of its local commerce shall be subject unto.

The same principle governs in the case of the one as in that of the other, that in so far as there is absence of leg-

islation imposing burden such silence is tantamount to a declaration that the use and exercise of the occupation, privilege or business of commerce local to the State shall be free of any and all burden other than such, if any, as the State has imposed.

d. Car movements, or the thereby exercise of franchise cannot have an imputed situs.

In *People ex rel. Manhattan R. Co.* vs. *Barker* (152 N. Y., 417), Judge Vann, writing, at page 439, says:

> "The lease of a line of railroad necessarily includes the use of the franchise of the company owning it, for without it the lessee would have no right to operate the road."

If and so far as these car movements outside of this State carry on a commerce local to the State in which the car movements occur, such commerce is that of that State, carried on under and in pursuance of its authority, subject to its control and under its protection; and the corporate right and privilege exercised therein are those granted or extended by that State, and are subject unto only such regulation and burden as that State imposes.

When the rolling stock of this relator is used and employed outside of New York State, either by relator or by other corporations, it is so employed in the exercise of franchises granted by other states and foreign countries, respectively, which franchises have their fixed *situs* where the corporeal property is, the use of which for railroad purposes constitutes exercise of the franchise; and the tax in respect thereof herein complained of has no other foundation than the subjection to the burden thereof of the use and exercise of franchise granted by such other state or country, or of the commerce carried on by the means and use of the said franchises.

There is no rule or principle of law by which these cars, or the capital of relator invested in or represented by

them, can, during their absence from this State, be regarded as employed within this State, or as exercising any franchise or performing any function the right whereof is granted by this State, or as in any wise having the protection of this State.

The franchise itself cannot be deemed to attend the owner to and at his domicil in another jurisdiction, and the same is true of the use and exercise of the franchise, and of the business consisting of the use and exercise of the franchise.

The principle upon which tangible property more or less constantly in movement to and from and within and without the State in which its owner resides may be deemed to have the *situs* of the owner's domicil, for the purposes of its taxation as property, has no application to a privilege tax upon the employment of the property, in such wise as to impute its employment to the State of the owner's domicil, when it is in fact employed elsewhere, nor to impute its employment to the use and exercise of franchises granted by that State, when in fact its employment is in the use and exercise of franchises granted by other States, Territories and Dominions.

The fact, in so far as it be a fact, that the transportation service performed with and by petitioner's cars, when outgoing begins, and when incoming ends in this State, and in the use and exercise therein of franchises granted by this State, does not, as matter of law or fact, serve to localize or give *situs* in this State to such entire transportation service, or to the entire employment of such cars, or to the use and exercise of all of the franchises under authority whereof the entire transportation service is performed.

Attempt to impute the use and exercise of the occupation, privilege or business thus carried on in other States to the franchise conferred by this State upon this relator, instead of to the franchise of and pertaining to the rail-

roads in other States, upon and over which the business is conducted, does not at all serve or tend to bring such use and exercise of occupation, privilege or business within the power of the taxing jurisdiction of this State.

The occupation, privilege or business used and exercised in such other States is nevertheless that of inter-state and foreign commerce, and of commerce local to such other respective State wherein the car operations are conducted and carried on, and in either case beyond the taxing jurisdiction of this State.

Phila. Steamship Co. vs. *Pennsylvania*, 122 U. S., 326.

No rule of law or principle of law does or can impute to the domicil of the owning corporation these car movements, or the therein or thereby exercise of franchise or privilege.

e. Taxation of exercise of franchise to do can only be imposed by the sovereignty in whose domain the work is done.

The case of *Adams Express Co.* vs. *Ohio*, 165 U. S., 194, involved the validity of *ad valorem* taxation. The express company contended that the only subject-matter of assessment was its physical property situate within the State, and that the assessment and the statute under which it was made were invalid in that the valuation, as by the statute directed, was based upon assumption that its entire property was employed in its business and that its property employed in and having a *situs* for taxation in Ohio consisted of such proportion of its entire property constituting a business unit as the mileage over which it operated in Ohio bore to the entire mileage of its operations.

Mr. Chief Justice Fuller in an opinion sustaining the

validity of the law and assessment, at page 222, mentions "the contract for transportation facilities" as a part of the unit subject to such taxation. He quotes from the Supreme Court of Ohio, among other, the following:

(p. 224.) "'If by reason of the good will of the concern, or the skill, experience and energy with which its business is conducted, the market value of the capital stock is largely increased, whereby the value of the tangible property of the corporation, considered as an entire plant, acquires a greater market value than it otherwise would have had, it cannot properly be said not to be its true value in money within the meaning of the Constitution, because good will and other elements indirectly entered into its value. The market value of property is what it will bring when sold as such property is ordinarily sold in the community where it is situated; and the fact that it is its market value cannot be questioned because attributed somewhat to good will, franchise, skillful management of the property or any other legitimate agency,'"

and commenting thereon the Chief Justice, at page 226, said:

"Nor, in this view, is the assessment on property not within the jurisdiction of the taxing authorities of the State, and for that reason amounting to a taking of property without due process of law. The property taxed has its actual *situs* in the State and is, therefore, subject to the jurisdiction, and the distribution among the several counties is a matter of regulation by the state legislature."

(p. 229.) "Considering, as we do, that the unit rule may be applied to express companies without disregarding any other Federal restriction, we think it necessarily follows that this law is not open to the objection of denying the equal protection of the laws."

That is to say that where the corporation exercises its franchise to do, that franchise has a *situs* for taxation in

the domain of the sovereignty where that franchise is exercised.

Concession of the soundness of that proposition is inconsistent with the theory that another state by the mere fact that it is the state of the domicil of the corporation, can draw to itself the power to impose a privilege tax upon such foreign exercise of the franchise.

The franchise exercised was in large part that of using the railroad situate in Ohio for its transportation business. Such use is a *pro tanto* exercise of the corporate charter powers conferred by the state of Ohio upon railroads chartered by and situate within that state.

In the same case on motion for re-hearing (166 U. S., 185) Mr. Justice Brewer, at pages 224, 225, said:

> "The franchise to do is an independent franchise, or rather a combination of franchises, embracing all things which the corporation is given power to do, and this power to do is as much a thing of value and a part of the intangible property of the corporation as the franchise to be. Franchises to do go wherever the work is done. The Southern Pacific Railway Company is a corporation chartered by the State of Kentucky, yet within the limits of that State it is said to have no tangible property and no office for the transaction of business. The vast amount of tangible property which by lease or otherwise it holds and operates, and all the franchises to do which it exercises, exist and are exercised in the States and Territories on the Pacific Slope. Do not these intangible properties—these franchises to do—exercised in connection with the tangible property which it holds, create a substantive matter of taxation to be asserted by every State in which that tangible property is found?"

The commerce thus carried on by car movements in other states consists of either that local to such state or that of an interstate or foreign character.

The privilege of carrying it on is in either case not

derived from this state, and taxation upon the exercise of such privilege transcends the jurisdiction of the state.

McCulloch vs. *Maryland*, 4 Wheat., 316, 429.
State Tax on Foreign held Bonds, 15 Wall., 300.
Morgan vs. *Parham*, 16 Wall., 471, 478.
Delaware Railroad Tax, 18 Wall., 206, 229.
Gloucester Ferry Co. vs. *Pennsylvania*, 114 U. S., 196, 206, 209.
Phila. Stshp. Co. vs. *Pennsylvania*, 122 U. S., 326, 344.
Erie Railroad vs. *Pennsylvania*, 153 U. S., 628, 646.
Leloup vs. *Mobile*, 127 U. S., 640, 648.
Postal Tel. Cable Co. vs. *Adams*, 155 U. S., 688, 695, 696, 700.

These cases serve to illustrate the obvious difference between the instance of the state imposing a tax upon the value of, or a privilege tax for the use of a franchise granted by it, for the building and operation of a railroad within its domain, and that of imposing a tax upon and for the use and exercise of the occupation, privilege or business of interstate or foreign transportation, and that the state may not do this last merely because that state created and is the domicile of the corporation performing the transportation service.

The franchise thus exercised is that to maintain and operate the respective railroad within the territory of the sovereign which granted the franchise. Neither fact nor fiction ever did or can serve to constitute such franchise a commodity or property the *situs* of which might accompany the owner in another sovereignty in which such owner of the franchise might be domiciled. What is true of the franchise in this regard is true of the lease or license

under authority of which relator's cars are employed in the use of the franchise.

Louis. & Jeff. Ferry Co. vs. *Kentucky*, 188 U. S., 385.

It follows that the privilege tax prescribed by this legislation cannot be in lieu of or the basis of exemption from *ad valorem* taxation of and upon these franchises as property; and that it cannot be supported as a privilege tax upon the exercise of either the franchises granted by other states of and for the railroads over which relator's rolling stock operates, or the franchise granted by the State of New York to relator of and for its corporate organization, existence and capacity.

(*f*) *Local commerce is subject to local tax by the State wherein it is conducted.*

State of N. Y., ex rel., Penn. R.R. Co. vs. *Knight*, 192 U. S., 21 (affirming 171 N. Y., 354), involved a business tax imposed upon the relator in respect of its cab service to and from its ferry terminals in New York.

Mr. Justice Brewer, writing for the Court, said:

> (p. 26.) "Undoubtedly, a single act of carriage or transportation wholly within a state may be part of a continuous interstate carriage or transportation. Goods shipped from Albany to Philadelphia may be carried by the New York Central Railroad only within the limits of New York, and yet that service is an interstate carriage. By reason thereof the Nation regulates that carriage, including the part performed by the New York company. But it does not follow therefrom that the New York company is wholly relieved from State regulation and State taxation, for a part of its work is carriage and transportation begun and ended within the State. So the Pennsylvania company, which is engaged largely in interstate transportation, is amenable to State regulation and State taxation as to any of its service, which

is wholly performed within the State and not as a part of interstate transportation. Wherever a separation in fact exists between transportation service wholly within the State and that between the States a like separation may be recognized between the control of the State and that of the Nation (*Osborne* vs. *Florida*, 164 U. S., 650; *Pullman Co.* vs. *Adams*, 189 U. S., 420.)

As we have seen, the cab service is rendered wholly within the State and has no contractual or necessary relation to interstate transportation. It is either preliminary or subsequent thereto. It is independently contracted for, and not necessarily connected therewith. But when service is wholly within a State, it is presumably subject to State control. The burden is on him who asserts that, though actually within, it is legally outside the State; and unless the interstate character is established, locality determines the question of jurisdiction."

(p. 28.) "We are of opinion that the cab service is an independent local service, preliminary or subsequent to any interstate transportation, and therefore the judgment of the Supreme Court of the State of New York was correct, and it is *affirmed*."

g. Determination as to what tax the exercise of the occupation, privilege or business of intra-state commerce may be subject unto, involves, (1), giving full faith and credit to the public acts of the State whose local commerce it is, and (2), acceptance thereof as thus accredited, as the sole basis of such determination.

In so far as any State wherein the occupation, privilege or business of intra-state or local commerce is used and exercised by operations of relator's cars therein, has imposed burden or regulation thereon, such burden or regulation is within the exclusive power of such State.

In so far as such State has refrained from burden upon or regulation of such commerce, its inaction is equivalent to a declaration that it shall be free.

Taxation of the use and exercise of the franchise employed in such other State, based upon stock capital invested in the average number of cars operated in such other State, is a burden upon and regulation of the intrastate or local commerce of the State wherein the said cars are operated.

Attempt of the State of New York to impose burden upon the use and exercise of the occupation, privilege or business of such commerce of another State, denies full faith and credit to the public acts of such State.

Petitioner having alleged and proved that of its entire capital only a designated average portion is employed in the State of New York or in the use and exercise of franchises granted by that State, and that the remaining average portion thereof is continuously and at all times employed in other respective States, Territories and Dominions, in the use and exercise of franchises granted by them respectively, the imposition by the State of New York under existing legislation, of a tax, computable upon the basis of the entire capital of relator employed in the use and exercise of all of the said franchises, constitutes an unauthorized and unwarranted burden upon the use and exercise in other States, Territories and Dominions of the franchises granted by them, respectively.

Taxation by the State of New York of and upon such use and exercise of any corporate franchise as is embraced or involved in the operation of relator's cars upon and over railroads chartered by and situate in other States, is a burden upon and regulation of the franchise and commerce of such railroads, and of the State in which such railroads are situate, and as such contravenes the Federal Constitution in that it denies full faith and credit to the public acts of such other States, and constitutes the taking of property by means of process operating beyond the territorial jurisdiction of this State, and hence without due process of law.

The effect of the holding of the State Courts, that this statute authorizes taxation to be computed upon the basis of the capital employed in and by the average number of relator's cars operated outside of this State, is to subject the Statue to the rule announced by this Court in *Wabash, &c., Ry. Co.,* vs. *Illinois* (118 U. S., 557), in which Justice Miller, writing at page 565, says:

> "It might admit of question whether the statute of Illinois, now under consideration, was designed by its framers to affect any other class of transportation than that which begins and ends within the limits of the State. The Supreme Court of Illinois, having in this case given an interpretation which makes it apply to what we understand to be commerce among the States, although the contract was made within the State of Illinois, and a part of its performance was within the same State, we are bound, in this court, to accept that construction."

h. The effect of the statute (Tax Law, Sec. 182), as adjudged by the New York courts, is to tax the corporate use and exercise in other states, of the occupation, privilege, and business, of the local commerce of those states.

In *Louisville, &c., Ferry Co.* vs. *Kentucky,* 188 U. S., 385, Mr Justice Harlan, writing for the court, at pages 397-398, says:

> "We recognize the difficulty which sometimes exists in particular cases in determining the *situs* of personal property for purposes of taxation, and the above cases have been referred to because they have gone into judgment and recognize the general rule that the power of the state to tax is limited to subjects within its jurisdiction or over which it can exercise dominion. No difficulty can exist in applying the general rule in this case; for, beyond all question, the ferry franchise derived from Indiana is an incorporeal hereditament derived from and having its legal *situs*

in that State. It is not within the jurisdiction of Kentucky. The taxation of that franchise or incorporeal hereditament by Kentucky is, in our opinion, a deprivation by that State of the property of the ferry company without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States; as much so as if the State taxed the real estate owned by that company in Indiana.

This view is not met by the suggestion that Kentucky can make it a condition of the exercise of corporate powers under its authority that the tax upon the franchise granted by it shall be measured by the value of all its property, wherever situated, of whatever nature, or from whatever source derived. It is a sufficient answer to this suggestion to say that no such condition was prescribed in the charter of the ferry company when it was granted and accepted. Nor does the taxing statute in question make it a condition of the ferry company's continuing to exercise its corporate powers that it shall pay a tax for its property having a *situs* in another State. There is no suggestion in the company's charter that the State would ever, in any form, tax its property having a *situs* in another State. We express no opinion as to the validity of such a condition if it had been inserted in the company's charter, or if it were now, in terms, prescribed by any statute. We decide nothing more than it is not competent for Kentucky, under the charter granted by it, and under the Constitution of the United States, to tax the franchise which its corporation, the ferry company, lawfully acquired from Indiana, and which franchise or incorporeal hereditament has its *situs*, for purposes of taxation, in Indiana."

Mr. Justice Peckham, writing for the court in *Delaware, L. & W. R. Co.* vs. *Pennsylvania*, 198 U. S., 341, at page 352, says:

"The only question for this Court to determine is whether, in refusing to deduct the value of the coal

mined in Pennsylvania, and which at the time of the appraisement was situated outside the jurisdiction of the State, from the value of the capital stock, the state court denied any right of the plaintiff in error, which was protected by the Federal Constitution."

(p. 358.) "It is true that in general an appraisement of or an assessment of a tax upon value is a decision upon a question of fact, and a difference of opinion as to the value between the assessing officer and the court is immaterial, and the decision of the former is final. But where the appraisement is arrived at by including therein tangible property, which is beyond the jurisdiction of the State, and which, therefore, the assessing officers had no jurisdiction to appraise (and none could be given them by the statute), such an appraisement or assessment is absolutely illegal, as made without jurisdiction.

The next question is whether there is a right to relief in a case like this, founded upon the provisions of the Federal Constitution. We think there is. The collection of a tax under such circumstances would amount to the taking of property without due process of law, and a citizen is protected from such taking by the Fourteenth Amendment."

The thing taxed is the use and exercise of the franchise employed in car movements, in states and dominions other than the State of New York. In so far as dependent upon the authority, sanction or protection of any state, it was other than that of the State of New York. The franchise used and the use thereof were equally as foreign to the State of New York as were the non-taxable cars foreign to Kentucky in the *Union Refrigerator case*, in which Mr. Justice Brown, writing for the Court, said:

"The power of taxation, indispensable to the existence of every civilized government, is exercised upon the asumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property,

or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another State, to which it may be said to owe an allegiance and to which it looks for protection, the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this Court to be beyond the power of the Legislature and a taking of property without due process of law."

"It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of State laws limited to persons and property within the boundaries of the State, but property which is wholly and exclusively within the jurisdiction of another State, receives none of the protection for which the tax is supposed to be the compensation. This rule receives its most familiar illustration in the cases of land which, to be taxable, must be within the limits of the State. Indeed, we know of no case where a Legislature has assumed to impose tax upon land within the jurisdiction of another State, much less where such action has been defended by any Court. It is said by this Court in the Foreign-held Bond case (15 Wall., 300-319), that no adjudication should be necessary to establish so obvious a proposition as that property lying beyond the jurisdiction of a State is not a subject upon which her taxing power can be legitimately exercised.

"The argument against the taxability of land within the jurisdiction of another State applies with equal cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing State but does not and cannot receive protection under its laws. True, a resident owner may receive an income from such property, but the same may be said of real estate within a

foreign jurisdiction. Whatever be the rights of the State with respect to the taxation of such income, it is clearly beyond its power to tax the land from which the income is derived. As we said in Louisville, etc., Ferry Co. *vs.* Kentucky (188 U. S., 385-396): 'While the mode, form and extent of taxation are, speaking generally, limited only by the wisdom of the Legislature, that power is limited by principle inhering in the very nature of constitutional government, namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing Government.' "

The use, exercise and employment of whatsoever franchise was used, exercised or employed in these car movements in states and dominions other than New York were as foreign to its governance and protection as were the railroads upon and over which those movements were carried on. Such thereof as were conducted by and upon the roads of foreign corporations, the State of New York did not, either for those or any other purposes, have any jurisdiction of the corporations which carried on the car movements.

Conclusion.

The ground upon which the majority opinion of the Court of Appeals, in the case at bar, rests its departure from the rule administered in the case of *People* vs. *Campbell*, *supra*, will not stand the test of analysis.

The theory of the supposed distinction assumes that in the earlier cases the values of certain cars were excluded from the basis of computation of the tax because, during the entire tax year, specific individual cars of the value named, were continuously and permanently absent from and employed outside of this State; whereas, in the case at bar, the exclusion claimed has regard to an average

proportion of an aggregate number and value of cars employed in car movements, some wholly within, others partly within and partly without, and still others wholly without, this State.

If the things here taxed were the tangible property, it might be pertinent to note the fact that "the relator is a domestic corporation," and "it owns the rolling stock." This, for the purpose of distinguishing such thereof as was only temporarily absent from this State, and thus had no *situs* apart from that of the domicil of its owner, and hence taxable there, from other thereof which was permanently absent from and employed outside of the State, and thus had a foreign *situs*, and for that reason not taxable at the domicil of its owner.

The thing here taxed, however, being such use and exercise of whatsoever franchise is used and exercised in car movements outside the State, that use and exercise of franchise cannot have any locality or *situs* other than that of the road, or portion of road, upon and over which the respective car movement occurs.

If and in so far as the car movement is in the State of New York the franchise employed in and by such car movement, is exercised under the grant or permission, governance and protection of this State. Such movement in Pennsylvania, or other respective state, uses the requisite franchise under the grant or permission, governance and protection of the State in which the car movement is had.

Moreover, as each car movement is identified with and constitutes *pro tanto* the carrying on of commerce, it is perforce identified with and embraced in either the commerce of and local to that State or dominion in which the car movement occurs, or commerce interstate or foreign, and the exercise of franchise, in the first case, is beyond the taxing power of a sovereignty foreign to that in whose territorial domain the car movement is had; and in the

second case, is beyond the taxing power of a sovereignty whose jurisdiction does not embrace the governance of interstate and foreign commerce.

Requirement that, as the price of exercise of its franchise within this State, relator must submit to taxation computed upon the amount of its capital stock represented by its equipment, as well that employed outside of as that employed in commerce local to or within this State, denies to it the equal protection of the law.

Requirement that, as the price of exercise of its franchise within this State, relator must submit to taxation computed upon the amount of its capital stock represented by its equipment, as well that employed in exercise of whatsoever franchises are exercised in car movements in other States and foreign dominions, in the local commerce of such respective States or dominions, or in interstate or foreign commerce, as also that employed within the State of New York, transcends the jurisdiction of the State, in that it imposes burden and restriction upon interstate and foreign commerce, impairs the obligations of contracts under which such franchises exist and are used, denies full faith and credit to the public acts of other States, and takes property without due process of law, in that the process by which it is taken, is by such requirement made operative and effective extra the territorial and subject-matter sovereignty of the taxing State.

Respectfully submitted,

IRA A. PLACE,
Attorney for Plaintiff in Error.

ALBERT H. HARRIS,
THOMAS EMERY,
Of Counsel.

APPENDIX.

RAILROAD LAW.

"SEC. 78. LEASE OF ROAD. Any railroad corporation or any corporation owning or operating any railroad or railroad route within this state may contract with any other such corporation for the use of their respective roads or routes, or any part thereof, and thereafter use the same in such manner and for such time as may be prescribed in such contract. Such contract may provide for the exchange or guaranty of the stock and bonds of either of such corporations by the other, and shall be executed by the contracting corporations under the corporate seal of each corporation, and if such contract shall be a lease of any such road and for a longer period than one year, such contract shall not be binding or valid unless approved by the votes of stockholders owning at least two-thirds of the stock of each corporation which is represented and voted upon in person or by proxy at a meeting, called separately for that purpose upon a notice stating the time, place and object of the meeting, served at least thirty days previously upon each stockholder personally, or mailed to him at his post-office address and also published at least once a week, for four weeks successively, in some newspaper printed in the city, town or county where such corporation has its principal office, and there shall be endorsed upon the contract the certificate of the secretaries of the respective corporations under the seals thereof, to the effect that the same has been approved by such votes of the stockholders, and the contract shall be executed in duplicate and filed in the offices where the certificates of incorporation of the contracting corporations are filed. The road of a corporation can not be used under any such

contract in a manner inconsistent with the provisions of law applicable to its use by the corporation owning the same at the time of the execution of the contract. Such contracts shall be executed by the corporations, parties thereto, and proved and acknowledged in such manner as to entitle the same to be recorded in the office of the clerk or register of each county through or into which the road so to be used shall run. Nothing in this section shall apply to any lease in existence prior to May first, eighteen hundred and ninety-one."

FRANCHISE TAX LAW OF 1880.

Sections one, three, six, seven and eight of Chapter 542 of the Laws of 1880 were as follows:

"SECTION 1. Hereafter it shall be the duty of the president or treasurer of every association, corporation or joint-stock company liable to be taxed on its capital stock, as provided in section three of this act, to make report in writing to the comptroller, annually, on or before the fifteenth day of November, stating specifically the amount of capital paid in, the date, amount and rate per centum of each and every dividend declared by their respective corporations, joint-stock companies or associations, during the year ending with the first day of said month. In all cases where any such corporation, joint-stock company or association shall fail to make or declare any dividend upon either its common or preferred stock during the year ending as aforesaid, or in case the dividend or dividends made or declared upon either its common or preferred stock, during the year ending as aforesaid, shall amount to less than six per centum upon the par value of the said common or preferred stock, the treasurer and secretary thereof, after being duly sworn or affirmed to do and perform the same with fidelity, according to the best of their knowledge and belief, shall, between the first and fifteenth days of November in each year, in which no dividend has

been made or declared as aforesaid, or in which the dividend or dividends made or declared upon either its common or preferred stock amounted to less than six per centum upon the par value of said common or preferred stock, estimate and appraise the capital stock of such company upon which no dividend has been made or declared, or upon the par value of which the dividend or dividends made or declared amounted to less than six per centum, at its actual value in cash, not less, however, than the average price which said stock sold for during said year; and when the same shall have been so truly estimated and appraised, they shall forthwith forward to the comptroller a certificate thereof, accompanied by a copy of their said oath or affirmation, by them signed, and attested by the magistrate or other person qualified to administer the same, provided, that if the comptroller is not satisfied with the valuation so made and returned, he is hereby authorized and empowered to make a valuation thereof and to settle an account upon the valuation so made by him for the taxes, penalties and interest due the estate thereon; and any association, corporation or joint-stock company dissatisfied with the account so settled may within ten days appeal therefrom to the board of equalization, which board, on such appeal, shall affirm or correct the account so settled by the comptroller, and the decision of said board shall be final; but such appeal shall not stay proceedings unless the full amount of the taxes, penalties and interest as due on said account, as settled by the comptroller, be deposited with the State treasurer."

"SECTION 3. Every corporation, joint stock company or association whatever, now or hereafter incorporated under any law of this State, or now or hereafter incorporated by any other State or country and doing business in this State, except savings banks, and institutions for savings, life insurance companies, banks and foreign insurance companies, and manufacturing corporations carrying on manufacture within this State, shall be subject to and pay a tax into the treasury of the State annually, to be computed as follows: If the dividend or dividends, made or de-

cleared by such corporation, joint-stock company or association, during any year ending with the first Monday in November, amount to six or more than six per centum upon the par value of its capital stock, then the tax to be at the rate of one-quarter mill upon the capital stock for each one per centum of dividend so made or declared, or if no dividend be made or declared, or if the dividend or dividends made or declared do not amount to six per centum upon the par value of said capital stock, then the tax to be at the rate of one and one-half mills upon each dollar of a valuation of the said capital stock made in accordance with the provisions of the first section of this act; and in case any such corporation, joint stock company or association shall have more than one kind of capital stock, as, for instance, common and preferred stock, and upon one of said stocks a dividend or dividends amounting to six or more than six per centum upon the par value thereof has been made or declared, and upon the other no dividend has been made or declared or the dividend or dividends made or declared thereon amount to less than six per centum upon the par value thereof, then the tax shall be at the rate of one-quarter mill for each one percentum of dividend made or declared upon the capital stock, upon the par value of which the dividend or dividends made or declared amount to six or more than six per centum, and in addition thereto, tax shall be charged at the rate of one and one-half mills upon each dollar of a valuation, made also in accordance with the provisions of the first section of this act, of the capital stock upon which no dividend was made or declared, or upon the par value of which the dividend or dividends made or declared did not amount to six per per centum."

"SECTION 6. In addition to the taxes above provided for, every corporation formed for railroad, canal, steamboat, ferry, express navigation or transportation purposes, and every elevated railway company, and every other corporation, joint-stock company or association now or hereafter incorporated by

or under any law of this State, or now or hereafter incorporated by any other State or country and doing business in this State, and owning, operating or leasing to or from another corporation, joint-stock company or association, any railroad, canal, steamboat, ferry, express, navigation, pipe line or transportation route or line, or elevated railway, or other device for the transportation of freight or passengers, or in any way engaged in the business of transporting freights or passengers, and every telegraph company or telephone company incorporated under the laws of this or any other State, and doing business in this State, and every express company, palace car or sleeping car company, incorporated or unincorportated, doing business in this State, shall pay to the State treasurer for the use of the State a tax of five-tenths of one per centum upon the gross earnings in this State of said corporation or company, for tolls, transporation, telegraph or express business transacted in this State, and in arriving at the gross earnings of any express, palace car or sleeping car company, or freight line, there shall be first deducted the expenses paid to any common carrier for transportation upon such business within this State. Nothing in this section contained shall be held to apply to any street surface railroad company."

"SECTION 7. The tax imposed under section six of this act shall be paid semi-annually, upon the first days of February and August of each year, the first payment to be made on the first day of August, A.D. eighteen hundred and eighty, and for the purpose of ascertaining the amount of the same, it shall be the duty of the treasurer, or other proper officer of the corporations, joint-stock companies or associations therein referred to, to transmit to the comptroller a statement, under oath or affirmation, of the amount of the gross receipts of the said associations, corporations or joint-stock companies derived from all sources during the preceding six months, and if any such corporation, joint-stock company or association shall neglect or refuse, for a period of thirty days after such tax become due, to make returns or to pay the

same, the amount thereof, with the addition of ten per centum thereto, shall be collected for the use of the State as other taxes are recoverable by law, from such corporation, joint-stock company or association."

"SECTION 8. The lands and real estate of the various corporations, joint-stock companies and associations mentioned in this act shall continue to be assessed and taxed where situated, but the capital stock and personal property of said corporations, joint-stock companies and associations shall hereafter be exempt from assessment or taxation, except as in this act prescribed, and no tax on gross receipts, except as in this statute authorized, shall be imposed or charged against any street horse-railroad company."

The above act was amended by Chapter 361 of the Laws of 1881, and thereby Sections one and three were made to read as follows:

"SECTION 1. Hereafter it shall be the duty of the president or treasurer of every association, corporation or joint-stock company liable to be taxed on its corporate franchise or business, as provided in section three of this act, to make report in writing to the comptroller annually, on or before the fifteenth day of November, stating specifically the amount of capital paid in, the date, amount and rate per centum of each and every dividend declared by their respective corporations, joint-stock companies or associations, during the year ending with the first day of said month. In all cases where any such corporation, joint-stock company or association shall fail to make or declare any dividend upon either its common or preferred stock during the year ending as aforesaid, or in case the dividend or dividends made or declared upon either its common or preferred stock during the year ending as aforesaid, shall amount to less than six per centum upon the par value of the said common or preferred stock, the treasurer and secretary thereof, after being duly sworn or affirmed to do and perform the same with fidelity, according to the best of their knowledge and belief, shall, between the first and fifteenth days of

November, in each year in which no dividend has been made or declared as aforesaid, or in which the dividend or dividends made or declared upon either its common or preferred stock amounted to less than six per centum upon the par value of said common or preferred stock, estimate and appraise the capital stock of such company upon which no dividend has been made or declared, or upon the par value of which the dividend or dividends made or declared amounted to less than six per centum, at its actual value in cash, not less, however, than the average price which said stock sold for during said year; and when the same shall have been so truly estimated and appraised, they shall forthwith forward to the comptroller a certificate thereof, accompanied by a copy of their said oath or affirmation, by them signed, and attested, by the magistrate or other person qualified to administer the same; provided, that if the comptroller is not satisfied with the valuation so made and returned, he is hereby authorized and empowered to make a valuation thereof and to settle an account upon the valuation so made by him for the taxes, penalties and interest due the state thereon; and any association, corporation or joint-stock company dissatisfied with the account so settled, may within ten days appeal therefrom to a board consisting of the secretary of state, attorney-general and state treasurer, which board, on such appeal, shall affirm or correct the account so settled by the comptroller, and the decision of said board shall be final; but such appeal shall not stay proceedings unless the full amount of the taxes, penalties and interest as due on said account, as settled by the comptroller, be deposited with the state treasurer."

"SECTION 3. Every corporation, joint-stock company or association whatever, now or hereafter incorporated or organized under any law of this state, or now or hereafter incorporated or organized by or under the laws of any other state or country and doing business in this state, except savings banks, and institutions for savings, life insurance companies, banks and foreign insurance companies, and manufacturing

corporations carrying on manufacture within this state, which exception shall not be taken to include gas companies or trust companies, shall be subject to and pay a tax, as a tax upon its corporate franchise or business, into the treasury of the state annually, to be computed as follows: If the dividend or dividends made or declared by such corporation, joint-stock company or association, during any year ending with the first day of November, amount to six or more than six per centum upon the par value of its capital stock, then the tax to be at the rate of one-quarter mill upon the capital stock for each one per centum of dividends so made or declared; or if no dividend be made or declared, or if the dividend or dividends made or declared do not amount to six per centum upon the par value of said capital stock, then the tax to be at the rate of one and one half mills upon each dollar of a valuation of the said capital stock made in accordance with the provisions of the first section of this act; and in case any such corporation, joint-stock company or association shall have more than one kind of capital stock, as, for instance, common and preferred stock, and upon one of said stocks a dividend or dividends amounting to six or more than six per centum upon the par value thereof has been made or declared, and upon the other no dividend has been made or declared, or the dividend or dividends made or declared thereon amount to less than six per centum upon the par value thereof, then the tax shall be at the rate of one-quarter mill for each one per centum of dividend made or declared upon the capital stock, upon the par value of which the dividend or dividends made or declared amount to six or more than six per centum, and in addition thereto, tax shall be charged at the rate of one and one-half mills upon each dollar of a valuation, made also in accordance with the provisions of this act, of the capital stock upon which no dividend was made or declared, or upon the par value of which the dividend or dividends made or declared did not amount to six per centum."

"SECTION 6. In addition to the taxes above provided for, every corporation formed for railroad, canal, steamboat, ferry, express, navigation or transportation purposes, and every elevated railway company, and every other corporation, joint-stock company or association now or hereafter incorporated or organized by or under any law of this state, or now or hereafter incorporated or organized by or under the laws of any other state or country and doing business in this state, and owning, operating or leasing to or from another corporation, joint-stock company or association, any railroad, canal, steamboat, ferry, express, navigation, pipe line or transportation route or line, or elevated railway, or other device for the transportation of freight or passengers, or in any way engaged in the business of transporting freights or passengers, and every telegraph company or telephone company incorporated under the laws of this or any other state, and doing business in this state, and every express company or association, palace car or sleeping car company or association incorporated or unincorporated, doing business in this state, shall pay to the state treasurer for the use of the state, as a tax upon its corporate franchise or business in this state, a tax, at the rate of five-tenths of one per centum upon the gross earnings in this state of said corporation or company or association, for tolls, transportation, telegraph, telephone or express business transacted in this state."

"SECTION 7. The tax imposed under section six of this act shall, after the first day of August, eighteen hundred and eighty-one, be paid annually on the first day of August of each year. It shall be the duty of the president, secretary or other proper officer of the corporations, joint-stock companies or associations referred to in section six of this act to transmit to the comptroller, on the first day of August in each year, a statement under oath or affirmation of the amount of the gross earnings of the said associations, corporations or joint-stock companies derived from all sources during the year ending with the preceding thirtieth day of June, together with the

amount of tax imposed thereon by section six. And it shall also be the duty of the president, secretary or other proper officer of the corporations, joint-stock companies or associations referred to in section six of this act, to transmit to the comptroller on the first day of August, eighteen hundred and eighty-one, a statement under oath or affirmation of the amount of the gross earnings of the said associations, corporations or joint-stock companies derived from all sources during the six months ending with the thirtieth day of June, eighteen hundred and eighty-one, together with the tax imposed thereon by section six of this act. And if any such corporation, joint-stock company or association shall neglect or refuse for a period of thirty days after any tax imposed by sections six or seven of this act becomes due, to make returns or to pay the same, the amount thereof, with the addition of ten per centum thereto, shall be collected for the use of the state as other taxes are recoverable by law from such corporation, joint-stock company or association."

"SECTION 8. The corporations, joint-stock companies and associations mentioned in this act as taxable shall hereafter be exempt from assessment and taxation for state purposes, except upon their real estate and as herein provided; but they shall in all other respects be liable to assessment and taxation as heretofore."

Said section three was amended by Chapter 359 of the Laws of 1885 so as to read as follows:

"SECTION 3. Every corporation, joint-stock company or association whatever, now or hereafter incorporated or organized under any law of this state, or now or hereafter incorporated or organized by or under the laws of any other state or country, and doing business in this state, except savings banks and institutions for savings, life insurance companies, banks and foreign insurance companies, and manufacturing or mining corporations carrying on manufacture or mining ores within this state, which exception shall not be taken to include gas companies

or trust companies, shall be subject to and pay a tax as a tax upon its corporate franchise or business, into the treasury of the state annually, to be computed as follows: If the dividend or dividends made or declared by such corporation, joint-stock company or association during any year ending with the first day of November, amount to six or more than six per centum upon the par value of its capital stock, then the tax to be at the rate of one-quarter mill upon the capital stock for each one per centum of dividends so made or declared, or if no dividend be made or declared, or if the dividend or dividends made or declared do not amount to six per centum upon the par value of said capital stock, then the tax to be at the rate of one and one-half mills upon each dollar of the valuation of the said capital stock, made in accordance with the provisions of the first section of this act; and in case any such corporation, joint stock company or association shall have more than one kind of capital stock, as, for instance, common and preferred stock, and upon one of said stocks a dividend or dividends amounting to six or more than six per centum upon the par value thereof has been made or declared, and upon the other no dividend has been made or declared, or the dividend or dividends made or declared thereon amount to less than six per centum upon the par value thereof, then the tax shall be at the rate of one-quarter mill for each one per centum of dividend made or declared upon the capital stock upon the par value of which the dividend or dividends made or declared amount to six or more than six per centum, and in addition thereto tax shall be charged at the rate of one and one-half mills upon each dollar of a valuation, made also in accordance with the provisions of this act, of the capital stock upon which no dividend was made or declared, or upon the par value of which the dividend or dividends made or declared did not amount to six per centum."

By Chapter 501 of the Laws of 1885, the Act was further "amended by adding thereto nine additional sections, to

be called sections eleven," *et seq.*, of which the said sections eleven and fourteen are as follows:

"SECTION 11. The amount of capital stock which shall be the basis for tax under the provisions of section three of this act, in the case of every corporation, joint-stock company and association liable to taxation thereunder, shall be the amount of capital stock employed within this state. In making to the comptroller the report in writing or certificate of estimate and appraisal of the capital stock of such corporation, joint-stock company or association provided for by the first section of this act, it shall be the duty of the president or treasurer thereof, as the case may be, to state specifically the amount of capital stock employed within this state, of such corporation, joint-stock company or association. Whenever the comptroller is dissatisfied with such report or certificate of estimate and appraisal, as the case may be, of any corporation, joint-stock company or association whose capital is only partially employed within this state, he is authorized and empowered to ascertain, fix and determine the amount of capital employed within this state, and to settle an account for the taxes and penalties due the state thereon."

"SECTION 14. The comptroller is hereby authorized and directed, upon application to him made by any corporation, joint-stock company or association, to make, settle and adjust all accounts against such corporation, joint stock company or association, for all taxes and penalties arising under the third section of this act since the twelfth day of May, A. D. eighteen hundred and eighty-two, by taking as a basis for taxation the capital employed within the state by such corporation, joint-stock company or association. Provided, however, that such corporation, joint-stock company or association shall not be entitled to the benefit of a settlement upon such basis unless it shall have secured such adjustment and paid into the treasury the full amount of the taxes so settled, before the first day of August, eighteen hundred and eighty-five; nor shall this section apply to the case of any tax for which suit shall have been heretofore brought by the

attorney-general, in which suit the trial has been commenced, or in which judgment shall have been entered heretofore for the people for the amount of said tax. Any corporation, joint-stock company or association whose capital has heretofore been only partially employed within this state, and which is now liable for taxes arising under the third section of this act since the twelfth day of May, A. D. eighteen hundred and eighty-two, and which are still due and unpaid, may, at any time prior to the first day of August, eighteen hundred and eighty-five, pay to the state treasurer, for the use of the state, in full discharge of the same, such sum of money as shall be fixed by the comptroller as the tax due for the said period by the said corporation, joint-stock company or association, upon the basis of the capital employed within the state. Provided, that this section shall not apply to the case of any tax for which suit may have heretofore been brought by the attorney-general, and for which judgment shall have been entered therein, or if in such suit trial has been commenced."

TAX LAW.

"SEC. 2. DEFINITIONS. 1. 'Tax district' as used in this chapter, means a political subdivision of the state having a board of assessors authorized to assess property therein for state and county taxes.

2. 'County treasurer' includes any officer performing the duties devolving upon such officer under whatever name.

3. The terms 'land,' 'real estate,' and 'real property,' as used in this chapter, include the land itself above and under water, all buildings and other articles and structures, substructures and superstructures, erected upon, under or above, or affixed to the same; all wharves and piers, including the value of the right to collect wharfage, cranage or dockage thereon; all bridges, all telegraph lines, wires, poles and appurtenances; all

supports and inclosures for electrical conductors and other appurtenances upon, above and under ground; all surface, under ground or elevated railroads, including the value of all franchises, rights or permission to construct, maintain or operate the same in, under, above, on or through streets, highways, or public places; all railroad structures, substructures and superstructures, tracks and the iron thereon; branches, switches and other fixtures permitted or authorized to be made, laid or placed in, upon, above or under any public or private road, street or ground; all mains, pipes and tanks laid or placed in, upon, above or under any public or private street or place for conducting steam, heat, water, oil, electricity or any property, substance or product capable of transportation or conveyance therein or that is protected thereby, including the value of all franchises, rights, authority or permission to construct, maintain or operate, in, under, above, upon, or through, any streets, highways, or public places, any mains, pipes, tanks, conduits, or wires, with their appurtenances, for conducting water, steam, heat, light, power, gas, oil, or other substance, or electricity for telegraphic, telephonic or other purposes; all trees and underwood growing upon land, and all mines, minerals, quarries and fossils in and under the same, except mines belonging to the state. A franchise, right, authority or permission specified in this subdivision shall for the purpose of taxation be known as a 'special franchise.' A special franchise shall be deemed to include the value of the tangible property of a person, copartnership, association or corporation situated in, upon, under or above any street, highway, public place or public waters in connection with the special franchise. The tangible property so included shall be taxed as a part of the special franchise. No property of a municipal corporation shall be subject to a special franchise tax.

4. The term special franchise shall not be deemed to include the crossing of a street, highway or public place where such crossing is not at the intersection of another street or highway, unless such crossing shall be at other than right angles for a distance of not less than two hundred and fifty feet, in which case the whole of such crossing shall be deemed a special franchise. This subdivision shall not apply to any elevated railroad.

5. The terms 'personal estate,' and 'personal property,' as used in this chapter, include chattels, money, things in action, debts due from solvent debtors, whether on account, contract, note, bond or mortgage; debts and obligations for the payment of money due or owing to persons residing within this state, however secured or wherever such securities shall be held; debts due by inhabitants of this state to persons not residing within the United States for the purchase of any real estate; public stocks, stocks in moneyed corporations, and such portion of the capital of incorporated companies, liable to taxation on their capital, as shall not be invested in real estate.

"SEC. 3. PROPERTY LIABLE TO TAXATION. All real property within this State, and all personal property situated or owned within this State, is taxable unless exempt from taxation by law."

"SEC. 11. PLACE OF TAXATION OF PROPERTY OF CORPORATIONS. The real estate of all incorporated companies liable to taxation, shall be assessed in the tax district in which the same shall lie, in the same manner as the real estate of individuals. All the personal estate of every incorporated company liable to taxation on its capital shall be assessed in the tax district where the principal office or place for transacting the financial concerns of the company shall be, or if such company have no principal office, or place for transacting its financial concerns, then in the

tax district where the operations of such company shall be carried on. In the case of toll bridges, the company owning such bridge shall be assessed in the tax district in which the tolls are collected; and where the tolls of any bridge, turnpike, or canal company are collected in several tax districts, the company shall be assessed in the tax district in which the treasurer or other officer authorized to pay the last preceding dividend resides.

"SEC. 12. TAXATION OF CORPORATE STOCK. The capital stock of every company liable to taxation, except such part of it as shall have been excepted in the assessment roll or shall be exempt by law, together with its surplus profits or reserve funds exceeding ten per centum of its capital, after deducting the assessed value of its real estate, and all shares of stock in other corporations actually owned by such company which are taxable upon their capital stock under the laws of this state, shall be assessed at its actual value."

"SEC. 21. PREPARATION OF ASSESSMENT ROLL. They shall prepare an assessment roll containing six separate columns and shall, according to the best information in their power, set down:

1. In the first column the names of all the taxable persons in the tax district.

2. In the second column the quantity of real property taxable to each person with a statement thereof in such form as the commissioners of taxes shall prescribe.

3. In the third column the full value of such real property.

4. In thefourth column the full value of all the taxable personal property owned by each person respectively after deducting the just debts owing by him.

5. In the fifth column the value of taxable rents reserved and chargeable upon lands within the tax district, estimated at a principal sum, the interest of which,

at the legal rate per annum, shall produce a sum equal to such annual rents and if payable in any other thing except money the value of the rents in money to be ascertained by them and the value of each rent assessed separately, and if the name of the person entitled to receive the rent assessed cannot be ascertained by the assessors, it shall be assessed againt the tenant in possession of the real property upon which the rents are chargeable.

6. In the sixth column the value of the special franchise as fixed by the state board of tax commissioners.

7. Such assessment roll shall contain two additional columns in one of which shall be inserted the amount of the tax levied against each person named therein, and in the other the date of the payment of such tax."

"SEC. 27. REPORTS OF CORPORATIONS. The president or other proper officer of every moneyed or stock corporation deriving an income or profit from its capital or otherwise shall, on or before June fifteenth, deliver to one of the assessors of the tax district in which the company is liable to be taxed and, if such tax district is in a county embracing a portion of the forest preserve, to the comptroller of the state, a written statement specifying:

1. The real property, if any, owned by such company, the tax district in which the same is situated and, unless a railroad corporation, the sums actually paid therefor.

2. The capital stock actually paid in and secured to be paid in excepting therefrom the sums paid for real property and the amount of such capital stock held by the state and by any incorporated literary or charitable institution, and

3. The tax district in which the principal office of the company is situated or in case it has no principal office, the tax district in which its operations are carried on.

Such statement shall be verified by the officer making the same to the effect that it is in all respects just and

true. If such statement is not made within twenty days after the fifteenth day of June, or is insufficient, evasive or defective, the assessors may compel the corporation to make a proper statement by mandamus."

"SEC. 31. CORPORATIONS, HOW ASSESSED. The assessors shall assess corporations liable to taxation in their respective tax districts upon their assessment rolls in the following manner:

1. In the first column the name of each corporation, and under its name the amount of its capital stock paid in and secured to be paid in; the amount paid by it for real property then owned by it wherever situated; the amount of all surplus profits or reserve funds exceeding ten per centum of their capital, after deducting therefrom the amount of said real property and the amount of its stock, if any, belonging to the state and to incorporated literary and charitable institutions.

2. In the second column the quantity of real property except special franchises owned by such corporation and situated within their tax district.

3. In the third column the actual value of such real property, except special franchises.

4. In the fourth column the amount of the capital stock paid in and secured to be paid in, and of all of such surplus profits or reserve funds as aforesaid, after deducting the sums paid out for all the real estate of the company, wherever the same may be situated, and then belonging to it, and the amount of stock, if any, belonging to the people of the state and to incorporated literary and charitable institutions.

5. In the fifth column the value of any special franchise owned by it as fixed by the state board of tax commissioners."

"SEC. 42. ASSESSMENT OF SPECIAL FRANCHISES. The state board of tax commissioners shall annually fix and

determine the valuation of each special franchise subject to assessment in each city, town, or tax district. After the time fixed for hearing complaints the tax commissioners shall finally determine the valuation of the special franchises, and shall file with the clerk of the city or town in which said special franchise is assessed a written statement duly certified by the secretary of the board of the valuation of each special franchise assessed therein as finally fixed and determined by said board; such statement of valuation shall be filed with the town clerk of the respective towns within thirty days next preceding the first day of July in each year; and with the clerks of cities of the state within thirty days before the date set opposite the name of each city in the following schedule. In the city of New York such statement shall be filed with the department of taxes and assessments.

SCHEDULE OF DATES FOR FILING OF ASSESSMENTS OF SPECIAL FRANCHISES (omitted).

Each city or town clerk shall, within five days after the receipt by him of the statement of assessment of a special franchise by the state board, deliver a copy of such statement certified by him to the assessors or other officers charged with the duty of making local assessments in each tax district in said city or town and to the assessors of villages and commissioners of highways within their respective towns and villages. The valuations of every special franchise as so fixed by the state board shall be entered by the assessors or other officers in the proper column of the assessment roll before the final revision and certification of such roll by them, and become part thereof with the same force and effect as if such assessment had been originally made by such assessor or other officer. If a special franchise assessed in a town is wholly within a village, the valuation fixed by the state board for the town shall also be the valuation for the village. If a part only of such special franchise is

in a village, or is in a village situated in more than one tax district, it shall be the duty of the village assessors to ascertain and determine what portion of the valuation of such franchise, as the same has been fixed by the state board, shall be placed upon the tax roll for village purposes. The valuation apportioned to the town shall be the assessed valuation for highway purposes, and in case part of such special franchise shall be assessed in a village and part thereof in a town outside a village, the commissioners of highways of the town and village shall meet on the third Tuesday in August in each year and apportion the valuation of such special franchises between such town outside the village and such village for highway purposes. In case of disagreement between them the decision of the supervisor of the town shall be final. The town assessors shall make an apportionment among school districts at the time and in the manner required by section thirty-nine of this chapter. The valuation so fixed by the state board shall be the assessed valuation on which all taxes based on such special franchise in the city, town or village for state, municipal, school or highway purposes shall be levied during the next ensuing year. It shall not be necessary for the state board of tax commissioners to give notice to any person, co-partnership, association or corporation of the valuation of a special franchise located in any village for village purposes except in a case where such valuation is required to be made for such village purposes by the state board of tax commissioners. The assessors or other taxing officer, or other local officer in any city, town or village, or any state or county officer, shall on demand furnish to the state board of tax commissioners any information required by such board for the purpose of determining the value of a special franchise."

"SEC. 55. LEVY OF TAX BY SUPERVISORS. The board of supervisors of each county shall, at its annual meet-

ing, levy the taxes for the county, including the state tax, upon the valuations as equalized by it and estimate and set down in a separate column in the assessment-roll of each tax district therein, opposite to the sums set down as the valuation of real and personal property or property of incorporated companies or of the taxable rents reserved, the sum to be paid as a tax thereon, including the state tax, as fixed by the comptroller. Such assessment-roll shall, when the warrant is annexed thereto, become the tax roll of the tax district, and a copy thereof shall be delivered to the proper supervisor, who shall deliver it to the clerk of the proper city or town to be kept by him for its use."

"SEC. 180. ORGANIZATION TAX. Every stock corporation incorporated under any law of this state shall pay to the state treasurer a tax of one-twentieth of one per centum upon the amount of capital stock which the corporation is authorized to have, and a like tax upon any subsequent increase. Provided, that in no case shall such tax be less than one dollar. Such tax shall be due and payable upon the incorporation of such corporation or upon the increase of its capital stock. Except in the case of a railroad corporation neither the secretary of state nor county clerk shall file any certificate of incorporation or article of association, or give any certificate to any such corporation or association until he is furnished a receipt for such tax from the state treasurer, and no stock corporation shall have or exercise any corporate franchise or powers, or carry on business in this state until such tax shall have been paid. In case of the consolidation of existing corporations into a corporation, such new corporation shall be required to pay the tax hereinbefore provided for only upon the amount of its capital stock in excess of the aggregate amount of capital stock of said corporations. This section shall not apply to state and national banks or to building, mutual loan, accumulating

fund and co-operative associations. A railroad corporation need not pay such tax at the time of filing its certificate of incorporation, but shall pay the same before the railroad commissioners shall grant a certificate, as required by the railroad law, authorizing the construction of the road as proposed in its articles of association, and such certificate shall not be granted by the board of railroad commissioners until it is furnished with a receipt for such tax from the state treasurer."

"SEC. 184. ADDITIONAL FRANCHISE TAX ON TRANSPORTATION AND TRANSMISSION CORPORATIONS AND ASSOCIATIONS. Every corporation and joint-stock association formed for steam surface railroad, canal steamboat, ferry express, navigation, pipe-line, transfer, baggage express, telegraph, telephone, palace car or sleeping car purposes, and all other transportation corporations not liable to taxes under sections one hundred and eighty-five or one hundred and eighty-six of this chapter, shall pay for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, an annual excise tax or license fee which shall be equal to five-tenths of one per centum upon its gross earnings within the state, which shall include its gross earnings from its transportation or transmission business originating and terminating within this state, but shall not include earnings derived from business of an interstate character. All settlements for such taxes heretofore based by the comptroller upon gross earnings excluding earnings from interstate business, have been ratified and confirmed, except that the accounts for taxation under section six of chapter three hundred and sixty-one of the laws of eighteen hundred and eighty-one, for the years eighteen hundred and ninety-two and eighteen hundred and ninety-three, shall be settled and adjusted by the comptroller by excluding the earnings of an interstate character as provided by this section."

"SEC. 189. REPORTS OF CORPORATIONS. Corporations liable to pay a tax under this article shall report as follows:

1. CORPORATIONS PAYING FRANCHISE TAX. Every corporation, association or joint-stock company liable to pay a tax under section one hundred and eighty-two of this chapter shall, on or before November fifteenth in each year, make a written report to the comptroller of its condition at the close of its business on October thirty-first preceding, stating the amount of its authorized capital stock, the amount of stock paid in, the date and rate per centum of each dividend declared by it during the year ending with such day, the entire amount of the capital of such corporation, and the capital employed by it in this state during such year.

2. TRANSPORTATION AND TRANSMISSION CORPORATIONS. Every transportation or transmission corporation, joint-stock company or association liable to pay an additional tax under section one hundred and eighty-four of this chapter, shall also, on or before August first in each year, make a written report to the comptroller of its condition at the close of its business on June thirtieth preceding, stating the amount of its gross earnings from all sources and the amount of its gross earnings from all transportation or transmission business originating and terminating within this state.

* * * * * * *."

"SEC. 190. VALUE OF STOCK TO BE APPRAISED. In case no dividend has been declared, by a corporation, association or joint-stock company liable to pay a tax under section one hundred and eighty-two of this chapter, the treasurer or secretary of the company shall, under oath, between the first and fifteenth day of November in each year, estimate and appraise the capital stock of such company upon which no dividend has been declared, or upon which the dividend amounted to less than six per centum

at its actual value in cash, not less, however, than the average price which said stock sold for during said year, and shall forward the same to the comptroller with the report provided for in the last section. If the comptroller is not satisfied with the valuation so made and returned he is authorized and empowered to make a valuation thereof, and settle an account upon the valuation so made by him, and the taxes, penalties and interest to be paid the state."

"SEC. 195. REVISION AND READJUSTMENT OF ACCOUNTS BY COMPTROLLER. The comptroller may, at any time within one year from the time any such account shall have been audited and stated, and notice thereof sent to the person, partnership, company, association or corporation against whom it is stated, revise and readjust such account upon application therefor by the party against whom the account is stated or by the attorney-general, and if it shall be made to appear upon any such application by evidence submitted to him or otherwise, that any such account included taxes or other charges which could not have been lawfully demanded, or that payment has been legally made or exacted of any such account, he shall resettle the same according to law and the facts, and charge or credit, as the case may require, the difference, if any, resulting from such revision or resettlement upon the accounts for taxes of or against any such person, partnership, company, association or corporation. The comptroller shall forthwith send written notice of its determination upon such application to the applicant, which notice may be sent by mail to his post-office address.

"SEC. 196. REVIEW OF DETERMINATION OF COMPTROLLER BY CERTIORARI. The determination of the comptroller upon any application made to him by any person, partnership, company, association or corporation for a revision and resettlement of any account, as pre-

scribed in this article, may be reviewed both upon the law and the facts, upon certiorari by the supreme court at the instance of any person, partnership, company, association or corporation affected thereby, and in the name and on behalf of the people of the state. For the purpose of such review the comptroller shall return, on such certiorari, the accounts and all the evidence before him on such application, and all the papers and proofs upon the original statement of such account and all proceedings thereon. If the original or resettled accounts shall be found erroneous or illegal, either in point of law or of fact, by the supreme court, upon any such review, the accounts reviewed shall then be corrected and restated, and from any determination of the supreme court upon any such review, an appeal to the court of appeals may be taken by either party."

"SEC. 202. EXEMPTIONS FROM OTHER STATE TAXATION. The personal property of every corporation, company, association or partnership, taxable under this article, other than for an organization tax, shall be exempt from assessment and taxation upon its personal property for state purposes, and the personal property of every corporation taxable under section one hundred and eighty-seven-a of this article, other than for an organization tax, and as provided in chapter thirty-seven of the general laws, shall be exempt from assessment and taxation for all other purposes, if all taxes due and payable under this article have been paid thereby. The personal property of a private or individual banker, actually employed in his business as such banker, shall be exempt from taxation for state purposes, if such private or individual banker shall have paid all taxes due and payable under this article. Such corporation and private or individual banker shall in no other respect be relieved from assessment and taxation by reason of the provisions of this article. The owner and holder of stock in an incorpo-

rated trust company liable to taxation under the provisions of this act shall not be taxed as an individual for such stock."

LAWS OF 1899.

CHAP. 208.

"SECTION 1. There shall be imposed for the fiscal year commencing on the first day of October, eighteen hundred and ninety-nine, a state tax of seven one-hundredths of a mill on each dollar of the valuation of the real and personal property in this state subject to taxation, which tax shall be assessed, levied and collected by the annual assessment and collection of taxes for that year in the manner prescribed by law, and shall be paid by the several county treasurers into the treasury of the state, to be held by the state treasurer for appropriation to the purposes hereinafter designated."

LAWS OF 1899.

CHAP. 571.

"SECTION 1. There shall be imposed for the fiscal year beginning on the first day of October, eighteen hundred and ninety-nine, on each dollar of real and personal property of this state subject to taxation, taxes for the purposes hereinafter mentioned, which taxes shall be assessed levied and collected by the annual assessment and collection of taxes of that year in the manner prescribed by law, and shall be paid by the several county treasurers into the treasury of this state, to be held by the treasurer, to be applied to the purposes specified; that is to say; For the general fund, and for the payment of those claims and demands which shall constitute a lawful charge upon that fund during the fiscal year commencing October first, eighteen hundred and ninety-nine, one and twenty-

six one-hundredths of a mill; for the canal fund, for the payment of appropriations to pay the expenses of superintendence, maintenance and ordinary repairs during said fiscal year, eighteen one-hundredths of a mill; for the canal fund, for the payment of appropriations for those objects and work on the canals of this state which are not included in the appropriation for the superintendence, maintenance and ordinary repairs thereof during said fiscal year, four one-hundredths of a mill; for the canal fund, for the annual contribution to the canal debt sinking fund, pursuant to chapter seventy-nine of the laws of eighteen hundred and ninety-five, thirteen one-hundredths of a mill; for the free school fund, for the payment of those claims and demands which shall constitute a lawful charge upon that fund during said fiscal year, eighty one one-hundredths of a mill."

LAWS OF 1900.

CHAP. 421.

"SECTION 1. There shall be imposed, for the fiscal year beginning on the first day of October, nineteen hundred, on each dollar of real and personal property of this State subject to taxation, taxes for the purposes hereinafter mentioned, which taxes shall be assessed, levied and collected by the annual assessment and collection of taxes of that year in the manner prescribed by law, and shall be paid by the several county treasurers into the treasury of this state, to be held by the treasurer, to be applied to the purposes specified; that is to say: For the general fund, and for the payment of those claims and demands which shall constitute a lawful charge upon that fund during the fiscal year commencing October first, nineteen hundred, sixty-eight one-hundredths of a mill; for the canal fund, for the payment of appropriations to pay the ex-

penses of superintendence, maintenance and ordinary repairs during said fiscal year, and for deficiency in appropriation for the fiscal year ending September thirtieth, nineteen hundred, twenty-one one-hundredths of a mill; for the canal fund, for the payment of appropriations for those objects and work on the canals of this state which are not included in the appropriations for the superintendence, maintenance and ordinary repairs thereof during said fiscal year, eighteen one-hundredths of a mill; for the canal fund, for the annual contribution to the canal debt sinking fund, pursuant to chapter seventy-nine of the laws of eighteen hundred and ninety-five, thirteen one-hundredths of a mill; for the free school fund, for the payment of those claims and demands which shall constitute a lawful charge upon that fund during said fiscal year, seventy-six one-hundredths of a mill."

LAWS OF 1901.

CHAP. 643.

"SECTION 1. There shall be imposed, for the fiscal year beginning on the first day of October, nineteen hundred and one, on each dollar of real and personal property of this state subject to taxation, taxes for the purposes hereinafter mentioned, which taxes shall be assessed, levied and collected by the annual assessment and collection of taxes of that year in the manner prescribed by law, and shall be paid by the several county treasurers into the treasury of this state, to be held by the treasurer, to be applied to the purposes specified; that is to say: For the canal fund, for the payment of appropriations to pay the expenses of superintendence, maintenance and ordinary repairs during the fiscal year commencing October first, nineteen hundred and one, seventeen one-hundredths of a mill; for the canal fund, for

the payment of appropriations for those objects and work on the canals of this state which are not included in the appropriations for the superintendence, maintenance and ordinary repairs during the said fiscal year, fifteen one-hundredths of a mill; for the canal fund, for the annual contribution to the canal debt sinking fund, pursuant to chapter seventy-nine of the laws of eighteen hundred and ninety-five, thirteen one-hundredths of a mill; for the free school fund, for the payment of those claims and demands which shall constitute a lawful charge upon that fund during said fiscal year, seventy-five one-hundredths of a mill."

LAWS OF 1902.

CHAP. 615.

"SECTION 1. There shall be imposed, for the fiscal year beginning on the first day of October, nineteen hundred and two, on each dollar of real and personal property of this State subject to taxation, taxes for the purpose hereinafter mentioned, which taxes shall be assessed, levied and collected by the annual assessment and collection of taxes of that year in the manner prescribed by law, and shall be paid by the several county treasurers into the treasury of this State, to be held by the treasurer, to be applied to the purpose specified; that is to say: For the canal fund, for the annual contribution to the canal debt sinking fund, pursuant to chapter seventy-nine of the laws of eighteen hundred and ninety five, thirteen one-hundredths of a mill."

LAWS OF 1903.

CHAP. 641.

"SECTION 1. There shall be imposed, for the fiscal year beginning on the first day of October, nineteen hundred

and three, on each dollar of real and personal property of this state subject to taxation, taxes for the purpose hereinafter mentioned, which taxes shall be assessed, levied and collected by the annual assessment and collection of taxes of that year in the manner prescribed by law, and shall be paid by the several county treasurers into the treasury of this state, to be held by the treasurer, to be applied to the purpose specified, that is to say : For the canal fund, for the annual contribution to the canal debt sinking fund, pursuant to chapter seventy-nine of the laws of eighteen hundred and ninety-five, thirteen one-hundredths of a mill."

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

Supreme Court U. S.
FILED
APR 4 1906
JAMES H. MCKENNEY,
Clerk.

No. 81.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

against

NATHAN L. MILLER, AS COMPTROLLER OF THE STATE OF NEW YORK.

No. 82.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

against

NATHAN L. MILLER, AS COMPTROLLER OF THE STATE OF NEW YORK.

No. 586.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

against

OTTO KELSEY, AS COMPTROLLER OF THE STATE OF NEW YORK.

No. 587.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

against

OTTO KELSEY, AS COMPTROLLER OF THE STATE OF NEW YORK.

No. 588.

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

against

OTTO KELSEY, AS COMPTROLLER OF THE STATE OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

JULIUS M. MAYER,
Attorney General of the State of New York,
Attorney for Defendant in Error.
HORACE MCGUIRE,
Deputy Attorney General.

WASHINGTON, D. C. 2014

POINTS FOR DEFENDANT IN ERROR.

Cause No. 81 was instituted in the Supreme Court of the State of New York by the relator, who prayed that a writ of certiorari might be allowed directed to Erastus C. Knight, as Comptroller of the State of New York, who was the predecessor in office of Nathan L. Miller, the defendant in error, for the purpose of reviewing an assessment made by the Comptroller of the State of New York on the 13th day of December, 1901, to the amount of $106,000,000, upon which the tax computed was $159,000 (R. 81, page 7). The writ was granted and was heard at the Appellate Division, Third Department, State of New York, in the first instance, and by the determination of the said Appellate Division, Third Department, it was ordered (R. 81, page 42) that the determination of the Comptroller be corrected and restated and said taxes be reduced by the sum of $29,011.07, and judgment of the Appellate Division was entered thereon September 20, 1902 (R. 81, page 42). Both parties appealed from the determination of the Appellate Division to the Court of Appeals (R. 81, page 46), and the Court of Appeals modified the order of the Appellate Division as indicated in the opinion of Judge Haight (R. 81, page 49), as follows:

> "In view of the fact that there is no expressed finding by the comptroller that none of the relator's rolling stock was used exclusively outside of the State, I think it advisable that the proceedings should be remitted to the comptroller, to the end that further evidence may be taken upon that subject in case it should be claimed that some portion of the relator's rolling stock was used continuously outside of the State, and if it should be found that such was the fact, the amount thereof should be deducted and the order of the Appellate Division and that of the comptroller should be modified accordingly."

Chief Judge Parker and Judges Bartlett, Martin, and Cu
len concurred with Judge Haight in this opinion (page 54
and thereupon the remittitur of the Court of Appeals was r
mitted to the Supreme Court of the State of New York, a
by an order February 14, 1903, the judgment of the Court
Appeals was made the judgment of the Supreme Court (
81, page 47). In the meantime, Erastus C. Knight h
ceased to be the Comptroller of the State of New York, and
rehearing was had before Nathan L. Miller, as Comptrol
of the State of New York, and upon such rehearing the
fendant in error, on the 23d of April, 1903, determined "t
none of the rolling stock of the relator, the said N. Y. C.
H. R. R. R. Co. was, during the year in question (to wit,
year ending October 31, 1900), continuously and exclusiv
employed without the State of New York, and that the
lator is not entitled to any deduction from the amount fou
assessable by said judgment of the Court of Appeals on
count of the employment of any rolling stock outside of
State of New York during the year in question" (R.
page 64).

Whereupon the relator again applied for a writ of certio
against the defendant in error to review this determinat
and on the 13th day of June, 1903, the order for the issua
of the writ was granted by the Special Term (R. 81, page
and the writ granted (R. 81, page 57). The evidence ta
and proceedings had before Comptroller Miller, which
sulted in his determination of April 23, 1903 (R. 81,
64), was returned to the Appellate Division and is foun
R. 81, page 70, *et seq.*

Such proceedings were had upon the return of the
of certiorari in the Appellate Division, Third Departmen
the State of New York, that by an order duly made by
Appellate Division on the 10th day of November, 1903,
determination of the Comptroller was unanimously
firmed (R. 81, page 90). The opinion of the Appellate
vision upon this unanimous confirmance was written by

Justice Houghton and unanimously concurred in by his associates in that court (page 91). The relator then appealed to the Court of Appeals from the determination of the Appellate Division, Third Department (R. 81, page 92), and the Court of Appeals found and did order and adjudge (R. 81, page 94) that the order of the Appellate Division of the Supreme Court appealed from be affirmed with costs, and further recited that, the relator having contended in the Court of Appeals that if the statute purported to authorize the tax here in question, said statute was a violation of the Constitution of the United States in the particulars following:

The court held and adjudged: (1) The statute does not offend against the commerce clause (article 1 of section 8) of the Federal Constitution; (2) does not contravene the provisions of article 1, section 10 thereof, forbidding impairment of the obligations of contracts; (3) does not offend against the provisions of the fourteenth amendment thereof, forbidding the State to deprive any person of property without due process of law (R. 81, page 94).

On the 12th day of March, 1904, by an order of the Special Term, the judgment of the Court of Appeals so affirming the order of the Appellate Division and the determination of the Comptroller in auditing and stating the account of the relator for the State franchise tax based on the value of the capital stock of the relator employed in the State of New York for the year ending October 31, 1900, amounting to $159,000, was made the judgment of the Supreme Court of the State of New York (R. 81, page 96), and judgment was duly entered thereon (R. 81, page 97). The relator made its petition in the Supreme Court of the United States for a writ of error to the Supreme Court of the State of New York (R. 81, page 97), setting forth assignments of error (R. 81, page 105), and on the 2d day of August, 1904, a writ of error was granted (R. 81, page 112).

The question of fact to be determined by the Comptroller in view of the remittitur of the Court of Appeals upon such

evidence as should be produced before him was practically *what portion of the relator's rolling stock was used continuously outside of the State* in case it should be claimed that some portion of the relator's rolling stock was so used (R. 81, page 49). Before the Comptroller it was so claimed by the relator, and the relator gave certain evidence before the Comptroller which it claimed tended to establish that fact. It was claimed, however, by the Comptroller that the evidence given by the relator did not tend to establish this fact, and that no evidence was given before him competent to prove that any portion of the defendant's rolling stock was continuously without the State of New York for the year ending October 31, 1900. The Appellate Division and the Court of Appeals of the State of New York passed upon this evidence and decided that there was no proof before the Comptroller that any portion of its rolling stock was continuously without the State of New York during the period covered by the tax.

The tax in question was levied in pursuance of section 182 of the Tax Law, known as chapter 908 of the Laws of 1896, and in force during the years 1900, 1901, 1902, 1903 and 1904, and which provided for an annual tax of one and one-half mills upon such portion of the capital stock, at par, as the amount of capital employed within the State of New York bore to the entire capital of the corporation.

In the consolidation of these five cases, being numbers 81, 82, 586, 587 and 588, a word of explanation perhaps is necessary to show the exact position of the several cases.

The Comptroller finally adjusted the value of the capital stock of the relator in each of the tax years as follows:

No. 81, tax for 1900	$106,000,000.00
No. 82, tax for 1901	115,593,160.00
No. 586, tax for 1902	136,199,837.76
No. 587, tax for 1903	122,535,265.99
No. 588, tax for 1904	112,588,111.73

and the tax thereon computed at one and one-half mills

No. 81, tax for 1900	$159,000.00
No. 82, tax for 1901	173,389.74
No. 586, tax for 1902	204,299.76
No. 587, tax for 1903	183,802.90
No. 588, tax for 1904	168,882.17

The evidence taken in numbers 586, 587, and 588 is the same differing only in the amount of the appraised value of the capital stock for each of those years and the amount of the tax.

On page 26 of the record in 586, counsel for the plaintiff in error stated before the Comptroller his position in regard to the question which is before this Court, as follows:

> "That is to say practically sixty per cent. of our rolling stock, that is, in our freight cars, and a considerable percentage of our passenger cars, but much smaller, are constantly in the service upon foreign lines and outside of the State. It is not any particular cars that are so used. They are changing every day and every hour of the day, so with something upwards of forty millions' worth of rolling stock, we have the use ourselves of practically two-fifths of it. That is to say, the other three-fifths, substantially that, is on foreign roads and in use by them, and largely in use that we cannot control, if we wanted to, because in the course of business cars are transferred from one company to another without consultation at all with the owning company."

The stipulation hereafter referred to appears in cases 586, 587 and 588, as follows:

> By Counsel: "It is admitted that there is no substantial amount of the equipment of the New York Central and Hudson River Railroad Company that was used permanently, continuously or exclusively without the State during the entire tax year in question" (R. 586, page 34; R. 587 and 588, each at page 33).

Cases 586, 587 and 588 were progressed through the Court of Appeals of the State of New York in order that any Federal question, if one exists, raised in cases 81 and 82, and which were then pending in this court, might be argued with cases 586, 587 and 588.

The judgment of the Court of Appeals of the State of New York, in 586, 587 and 588, was rendered January 23, 1906 (R. 586, page 171; R. 587 and 588, each at page 170), and the remittitur from the Court of Appeals, at pages 170 and 171, in the cases of 586, 587 and 588, states that the relator contended in the Court of Appeals that the statute, if it purported to authorize the said tax, and the authority exercised under the statute in and by the imposition and exaction of the said tax, are, and each thereof is, violative of the Constitution of the United States in the several particulars following, but that the Court of Appeals of the State of New York "held and adjudged that the statute under and in pursuance of which the tax herein complained of is imposed and exacted, does not, and the authority exercised under this statute in and by the imposition and exaction of the said tax does not (1) offend against the commerce clause, article 1, section 8, of the Constitution of the United States; (2) nor contravene the provisions of article 1, section 10 thereof, forbidding impairment of the obligations of contracts; (3) nor offend against article 4, section 1, thereof, requiring that full faith and credit shall be given in each State to the public acts of every other State; (4) nor offend against the provisions of the fourteenth amendment thereof, forbidding the State to deprive any person of property without due process of law, and forbidding the State to deny to any person within its jurisdiction the equal protection of the laws."

ARGUMENT.

I.

There was no evidence before the Comptroller showing that any portion of the rolling stock of the relator was exclusively and continuously without the State of New York for the year ending October 31, 1900, or any of the other years under review.

The relator attempted to prove the portion of its rolling stock exclusively and continuously without the State of New York, in No. 81, by the use of two tables and several illustrations as to actual mileage of specific cars (Exhibit C for identification, R. 81, page 84).

The first table, Exhibit A for identification (R. 81, page 83), purports to be a division of the total equipment of relator based upon its total road mileage. That is to say, the total road mileage was 2,828.68 miles, of which 2,483.61 was in New York State and 345.07 outside the State, and, therefore, the relator argued and contended upon the basis of this total road mileage that 87.80 per cent. of the equipment was within the State and 12.20 per cent. outside the State.

It cannot be seriously urged that this theory of road mileage furnishes any evidence upon which the Comptroller could base a finding as to what amount of the property of the relator was actually employed during the year outside the State of New York.

Exhibit B for identification (R. 81, page 83) purports to give the value of the total equipment of the relator's property as $44,238,069.25, and to arrive at the amount then without the State another basis is adopted, to wit: the mileage of freight cars. That is, the total number of miles traveled by all freight cars was 540,074,721, of which 363,563,540, or

67.32 per cent. thereof, was in the State of New York and out of the State of New York, but on Vanderbilt lines, and 176,511,181 miles, or 32.68 per cent. thereof, was miles traveled by freight cars out of the State of New York and on other than Vanderbilt lines.

In this table the computation was arrived at as follows:

> "Mr. KELSEY (Comptroller): Q. This computation does not take as a basis any number of specific cars that were traced and found absent for any length of time.
>
> "A. No, sir; the mileage of cars in and out of the State is arrived at by the following method: We receive from other railroads records of the number of miles made by our cars upon other lines, but they don't give us the number of individual cars. Their reports to us will simply show 'Your cars made during the month so-and-so upon our lines so many miles;' *that might be ten or it might be fifty cars.* We assemble together all these miles made upon other roads and then divide that total between the miles made by cars on other roads in New York State and on other roads out of New York State" (R. 81 page 80).

Mr. Meeder, the witness for the relator, said (R. 81, page 80):

> "These figures do not indicate individual cars, but show simply the total miles made by the cars."

He says (R. 81, page 77):

> "The total freight car mileage shown on Exhibit B, showing the miles run by cars both in and out of New York State, was obtained from the records of the car accountant; the mileage of freight cars outside of New York State on roads other than the Vanderbilt lines was obtained from the same source; the per cent. which this latter figure bears to the former is 32.68 per cent. This percentage was applied to the total valuation of the freight cars and gave the result shown on Exhibit B, as valuation outside of New York."

The fallacy of this basis is illustrated as follows:

The purpose of the proceeding was to ascertain the value of the cars of relator continuously employed out of New York. Suppose a single car is of the value of $10,000. If that car is run continuously during the year upon the tracks of foreign railroads from San Francisco to Chicago, and thence to New Orleans, and thence to Los Angeles, it will make a great number of miles in the year, but its value remains at $10,000, just the same.

The relator also offered in evidence in No. 81, Exhibit 4 and Exhibit C for identification (R. 81, page 84), which consisted of the movements of New York Central freight cars between given dates. There are eleven of these specific cars given in the tables composing Exhibit C for identification, and are set forth at R. 81, pages 84 to 89, inclusive. The object of this testimony was as stated by counsel for the relator to be simply illustrative of the general habit of cars of the New York Central Railroad, but when the witness, Mr. Meeder, was questioned in regard to this illustration, he was asked:

> "Q. Having in mind, Mr. Meeder, the history of the movement of car No. 27,941, as shown in the Exhibit C for identification, to which your attention has been called, what have you to say as to whether that is or is not fairly illustrative of the movement of vast numbers of the freight cars of the New York Central and Hudson River Railroad Company during the year ending October 31, 1900, as regards their movement on other than so-called Vanderbilt lines?
>
> "A. I believe that this illustration of the movement of car No. 27,941, while showing dates subsequent to October 31, 1900, is an illustration of what did occur within the year ending October 31, 1900, as regards *numerous individual cars* belonging to the New York Central and Hudson River Railroad Company * * *" (R. 81, page 75).

Thus the testimony, so far as Exhibit C for identification is concerned, was illustrative, only, of the "*numerous individual*

cars," and, of course, furnished no evidence as to the actual number of individual cars continuously employed without the State, nor did it furnish a basis upon which a finding could be based as to the number and value of such cars. The testimony was purely speculative, and when the relator was seeking to obtain exemption from taxation, it was its duty to present to the Comptroller not speculative testimony or testimony in illustration of a fact, but affirmative, competent evidence bearing upon the question of fact before the tribunal for determination.

This witness was then asked (R. 81, page 74):

> "Q. Mr. Meeder, are you prepared to swear that any car or percentage of the cars and locomotives mentioned in that statement were continuously and also exclusively used without the State of New York?
>
> "A. No, sir, I am not prepared to swear to the number so employed, but so far as locomotives are concerned, I think comparatively few were so employed without the State."

Then again this witness was asked by the Comptroller (R. 81, page 78):

> "Q. Now, then, will you state for the Comptroller what the value was of the locomotives and other rolling stock of the New York Central and Hudson River Railroad which was continuously and exclusively without the State of New York?
>
> "A. I cannot tell from any information I have of the equipment so employed continuously and exclusively out of the State during the year, except upon an average basis."

Again:

> "The labor of following the movement of each individual car would be very great, and I may state as an indication of what that labor means the going through the records to pick out these individual cases which were picked out at random consumed several days of laborious tracing through all the car accountant's books."

In the testimony taken before the Deputy Comptroller in relation to the tax of 1902-3-4, the Deputy Comptroller asked (R. 587, page 33; R. 588, page 32; R. 589, page 33):

> "Q. In the testimony which you have given in relation to equipment outside of the State of New York, do you know, or has there been any computation made which would show whether or not any of the equipment of the New York Central and Hudson River Railroad Company was used continuously and exclusively without the State of New York? A. So far as I am aware, there is not.
>
> Q. None of it? A. As far as I am aware there has been no such computation in connection with this report.
>
> Q. Do you know whether there is any such equipment which is used continuously and exclusively without the State? A. I do not.
>
> Q. Do the figures which were furnished you show any such thing? A. They do not."

Whereupon counsel for the relator made the following stipulation:

> "By Counsel: It is admitted that there is no substantial amount of the equipment of the New York Central and Hudson River Railroad Company, that was used permanently, continuously or exclusively without the State during the entire tax year in question."

Furthermore, it appeared before the Comptroller by the rules governing per diem settlements for the use of freight cars that foreign roads were required to pay twenty cents per car per day, "which shall be paid for every calendar day and shall be known as the per diem rate" (R. 586, 587, 588, page 52); that the relator had the right to demand the return of its car after it had been twenty days continuously on any road (R. 586, page 53; R. 587, page 53; R. 588, page 52), and if the car was held by the road more than ten days after the day of such notice, making thirty days in all thereafter,

the penalty rate of eighty cents per day in addition to the per diem rate should be paid by such foreign road for the further use of that car (*idem*).

In regard to the tax of 1902-3-4, the relator offered in evidence before the Comptroller several tables of car movements (R. 586 and 587, page 61; R. 588, page 60), and was asked by the Deputy Comptroller as follows (page 38):

> "Q. Is this offered for the purpose of proving that these cars were operated exclusively outside the State of New York, or that they were operated at all outside the State of New York, by the New York Central Company" (R. 586 and 587, page 39; R. 588, page 38)?
>
> By COUNSEL: No.
>
> Deputy Comptroller TIMERMAN: Inasmuch as it isn't claimed that these exhibits will prove either of these facts, and as a matter of fact it isn't claimed,—I suppose that that really was the fact.
>
> By COUNSEL: No. Our cars are going to and from us and back and forth between other people daily and hourly" (R. 586, 587 and 588, same pages).

Whereupon the Comptroller did not deduct from his estimate of the valuation of the capital stock of the relator any sum whatever for rolling stock or freight equipment claimed to be employed and used by it continuously and exclusively outside the State of New York.

The relator contended before the Comptroller in these cases, as in the cases of People *ex rel.* New York Central Company *vs.* Knight and Miller, that by some system of average he had established at least *prima facie* that a considerable portion of its rolling stock or freight equipment was, during the tax period, employed exclusively and continuously outside of the State of New York.

This was the *question of fact* before the Comptroller, and it is this question of fact which was conclusively determined by the unanimous affirmance of the Appellate Division and the Court of Appeals of the State of New York.

A brief analysis of the car movements will disclose the following situation: Commence with car No. 90,110 (No. 586, page 62) and continue to car 27,941 (R. 586, page 69) and then take in Exhibit G. (R. 586, pages 164 to 167, inclusive). Car 90,110 left Lockport, N. Y., September 30, 1902, destined to Oklahoma City, and was returned to the relator November 19, 1902, being absent a period of one month and nineteen days. We find that in all there were twenty-two cars, presumably selected by the relator for the purpose of showing the wide divergence of time employed in making their several passages from the home State to a foreign State and return, and we further find that the total number of days of absence of these twenty-two cars, counting thirty days to a month, was 2,703 days, or an average absence of 123 days, or four months and three days, and the witness for the relator testified before the Comptroller that these car movements were fairly illustrative of the general course of business in handling the company's freight cars.

But upon a little more careful examination of these car movements, it will be observed that one of the relator's freight cars made the trip from Weehawken to Medicine Lodge, Kansas, and return in a period of twenty-one days, the car number being 46,260 (R. 586, page 165).

Again, car No. 24,241 made the trip from Weehawken to Winnipeg, Manitoba, and return in eighteen days (R. 586, page 166), and car No. 41,278 (R. 586, page 63) delivered to the Michigan Central Railroad Company, presumably at Buffalo, was seven months and twenty-eight days making the trip to Detroit, Michigan, and return (R. 586, pages 39 and 40), and car No. 59,578, delivered to the Lake Shore Railroad Company, destined to Chicago, Illinois (R. 586, page 40), was seven months and twenty-nine days in making the trip (page 64).

If the car movements above referred to are fairly illustrative of the general course of the business in the handling of

the company's freight cars, there must be something radically wrong in the system, or some of these cars must have been wrecked on their journey and have been rolling about the country as derelicts at sea, being of no use for transportation and a menace to all other freight cars performing the service for which they were intended.

In fact, the learned counsel for the relator, in his brief in the Court of Appeals, said:

> "Comparison of the movements of these respective cars, outside of the State of New York, establishes as clearly and convincingly as any fact could be established, that in the majority of instances the time of absence of the car from relator's business and the measure of use thereof by foreign corporations on other roads bears no substantial relation to the measure of such operation required for the purpose of carrying to its destination the loading with which the car leaves relator's road and subsequent return thereof with loading destined to some point upon relator's road, or otherwise return of the car."

The fallacy of the basis of the computation adopted by the relator, and urged so strenuously, is illustrated as follows:

The duty of the Comptroller was to ascertain the number of cars of the relator continuously employed out of New York State, and we will suppose a single car is of the value of $10,000. If that car is run continuously during the year upon the tracks of foreign roads, from San Francisco to Chicago and thence to New Orleans, and thence to Los Angeles, it will make a great number of miles within one year, but its value remains at $10,000 just the same.

Another car of the value of $10,000 is run from Buffalo to Detroit and back to Buffalo, and makes but a short mileage, but its value remains at $10,000.

It is the *value of the property* of the relator that is continuously without the State which became the question of fact to be determined by the Comptroller.

The relator has reported to it the whereabouts and em-

ployment of its equipment from time to time, and such evidence is the best evidence in regard to the continuous use of any of its equipment without the State, but no such proof was offered.

In fact, the learned counsel for the relator stated in his brief in the Court of Appeals:

> "The relator's freight car equipment consisting of approximately 60,000 cars, severally constantly moving within and from and without and into this State, in such manner as to render *impracticable* the making or furnishing of data regarding specific cars or numbers thereof, which may or may not have been employed within the State at some time during the tax year."

But we submit that because evidence is difficult to furnish, because evidence is impracticable, no lawful ground is shown for reversing a judgment upon a question of fact in the absence of such evidence.

The policy of the courts has been not to disturb the findings of the assessing officers. No system of taxation can be perfect, and the courts have realized the practical difficulties with which assessing officers are so frequently confronted. The reasons which have led to a conclusion or the methods of computation have not been inquired into by appellate courts, unless that method offends some provision of the statute under consideration or of the State or Federal Constitutions.

Coulter *vs.* Louisville & Nashville R. R. Co., 196 U. S., 599-610.

People *ex rel.* Metropolitan Street Ry. Co. *vs.* State Board of Tax Commissioners, 199 U. S., 1.

This proposition was so recently considered by the Supreme Court of the United States, in the special franchise tax cases, which came up from the State of New York, that further discussion is unnecessary.

We submit, therefore, that this Court will not go behind the determination of fact by the State courts, but will regard as conclusive the conclusion of the Comptroller, upheld by the State courts, that, as *matter of fact*, the capital stock (in other words, the capital) employed within the State of New York was the amount which the Comptroller, after a full hearing, finally determined was so employed.

II.

The statute under consideration does not offend against the commerce clause of the Federal Constitution, nor does it offend against the fourteenth amendment of the Federal Constitution.

Section 182 of the Corporation Tax Law provides as follows:

> "Every corporation, joint stock company or association incorporated, organized or formed under, by or pursuant to law in this state, shall pay to the state treasurer annually an annual tax, to be computed upon the basis of the amount of its capital stock employed within this state, and upon each dollar of such amount at the rate of one-quarter of a mill for each one per centum of dividends made and declared upon its capital stock during each year, ending with the 31st day of October, if the dividends amount to six or more than six per centum upon the par value of such capital stock. If such dividend or dividends amount to less than six per centum on the par value of the capital stock, the tax shall be at the rate of one and one-half mills upon such portion of the capital stock at par as the amount of capital employed within this state, bears to the entire capital of the corporation."

As was said in the Commercial Cable Company case (178 N. Y., 433, 439):

> "This court has held that the term capital stock as used in the statutes similar to the one under consideration, means not share stock but the property of the corporation contributed by its stockholders, or otherwise obtained by it to the extent required by its charter."

As the relator did not pay six per cent. upon its stock, it therefore became necessary for the Comptroller to ascertain the value of the corporate property employed within the State, simply as a basis of determining the per cent. of tax to be placed upon its franchise, and, as Judge Werner said in the Commercial Cable Company case:

> "The franchise is the thing taxed, and the tax is *computed* upon the basis of the amount of its capital stock employed within the State. The share stock, or in other words, the paper certificates held and owned by individuals are not employed within the State. It is the capital represented by such certificates that is so employed."

Counsel for the plaintiff in error refers to his brief to People *ex rel.* Niagara River Hydraulic Company *vs.* Roberts, 157 N. Y., 676; People *ex rel.* Fort George Realty Company *vs.* Miller, 179 N. Y., 49, and People *ex rel.* Singer Mfg. Co. *vs.* Wemple, 150 N. Y., 49.

These cases are of limited application, and were based on a peculiar state of facts individual to each of them. They have been clearly distinguished in the last word on this subject, by the Court of Appeals of the State of New York, in People *ex rel.* Wall & Hanover Street Realty Company *vs.* Miller, 181 N. Y., 328.

Although that case was decided by a bare majority of the Court of Appeals, it has been consistently followed by a

unanimous court, which now regards that case as authority without further dissent in

People *ex rel.* The Nassau Co. *vs.* Miller, as Comptroller, 182 N. Y., 521.

People *ex rel.* The North American Co. *vs.* Miller, as Comptroller, 182 N. Y., 521.

People *ex rel.* Fourteenth St. Realty Co. *vs.* Otto Kelsey, as Comptroller, 110 App. Div. (affirmed by Court of Appeals, March, 1906, without opinion).

People *ex rel.* Hubert Apartment Association *vs.* Otto Kelsey, as Comptroller, 110 App. Div. (affirmed by Court of Appeals, March, 1906, without opinion).

It is claimed on behalf of the relator that as applied to it the tax is a tax upon interstate commerce, and that the act under which it is imposed (section 182, Tax Law) is as to the relator an attempted regulation by the State of interstate commerce, which appertains exclusively to Congress, under article 1, section 8, clause 3 of the Federal Constitution.

Assuming it to be true (although relator did not prove it) that a large number of the freight cars of relator are sent by it out of the State of New York upon longer or shorter trips, to be returned again to the relator, when unloaded. This absence from the home port, to change the metaphor, is but a temporary absence. It is quite true that foreign lines do take and hold the freight cars of relator and use them for their own traffic, but it is a game both roads play, and presumably the game is fair.

It is also true that the freight cars of relator do eventually return, as ships to their home port, as is shown by the illustration furnished by relator in its Exhibit "C" for identification.

As was said by Mr. Justice Gray, in Pullman's Palace Car Company *vs.* Pennsylvania, 141 U. S. 18:

"No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national Legislature. So that State interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible."

Judge Haight, in the prevailing opinion in the case at bar, Record 81, page 49 of the record, said:

"As I understand this finding it is to the effect that the rolling stock of the relator is used in this State and outside of the State; that is, cars are loaded at some point in the State, as, for instance in the city of New York, and run over the relator's road to some other point, say, the city of Buffalo. They then are transferred on to other roads and are run to points outside of the State, where they are unloaded, and then reloaded and returned to this State. * * * but the use of the cars outside of the State is but temporary, for they are returned as soon as reloaded, and are again used in the transportation of persons and property within this State."

In the State Railroad Tax Cases (92 U. S., 575) Mr. Justice Miller, in delivering the judgment of the court, referring to the rule that the situs of personal property of a corporation is at times at the principal place of business of the corporation, and again where it is actually located, said:

"But, after all, the rule is merely the law of the State which recognizes it, and when it is called into operation as to property located in one State, and owned by a resident of another, it is a rule of comity in the

> former State, rather than an absolute principle in all cases. Green *v.* Van Buskirk, 5 Wall. 312. Like all other laws of a State it is, therefore, subject to legislative repeal, modification or limitation; and when the legislature of Illinois declared that it should not prevail in assessing personal property of railroad companies for taxation, it simply exercised an ordinary function of legislation."

It must be clear, therefore, that even if the Legislature of the State of New York determined by section 182 of the Tax Law to tax the freight cars of the relator when temporarily outside of the State of New York, its determination to do so and to determine the situs of that personal property was the exercise of a legislative function with which the Federal courts will not interfere.

The mere fact that some portion of the property of a domestic corporation is employed in interstate or foreign commerce does not preclude the State from taxing such property within its borders and by proper legislative enactment to determine the *situs* of such property, provided, of course, that the rights and powers of the national government are not interfered with.

In Atlantic and Pacific Telegraph Company *vs.* Philadelphia, 190 U. S., 160, 163, Mr. Justice Brewer said:

> "The franchise of a corporation, although that franchise is the business of interstate commerce, is a part of its property, subject to state taxation, providing at least the franchise is not derived from the United States."

In People *ex rel.* P. R. R. Co. *vs.* Wemple, 138 N. Y., 1, Judge Andrews says:

> "* * * the commerce provision of the Federal Constitution does not deprive the states of the power to levy a property tax upon property employed in interstate commerce, having a situs within the jurisdiction, provided no adverse discrimination is made in the imposition of the tax between such property

and other property of a similar character. The State may subject to a property tax, in common with other property, every description of property, real and personal, having its situs there, although used or employed exclusively in the business of foreign or interstate commerce. * * * The courts have given the broadest construction to the power of a State to lay a property tax on property employed in interstate commerce, provided, as before stated, it is subjected to no unjust discrimination. * * * Such taxation, although indirectly affecting interstate commerce, is held not to be a regulation of commerce prohibited by the Federal Constitution."

In the case of Pullman's Palace Car Company *vs.* Pennsylvania (141 U. S., 18) it will be remembered that the tax levied by the State of Pennsylvania against the Pullman's Palace Car Company was levied against a foreign corporation and upon *specific property* within the State of Pennsylvania. Not upon a franchise, but purely and simply upon property. It was found that the company had at all times substantially the same number of cars within the State and continuously and constantly used there a portion of its property, and it was distinctly found, as a matter of fact, that the company continuously, throughout the period for which the taxes were levied, carried on business in Pennsylvania and had about one hundred cars within the State.

There being, therefore, in the cases at bar, no evidence before the Comptroller upon which it could be found what the value was of the rolling stock of the relator which was claimed to be continuously employed without the State, his finding thereon is correct and was properly approved by the Appellate Division, and also by the Court of Appeals of the State of New York, *as a finding of fact upon the evidence presented to the Comptroller.*

In Levis *vs.* Monson, 151 U. S., 545, Mr. Justice Brewer said:

"No question is more clearly a matter of local law than one arising under the tax laws. * * * The

> determination of any questions affecting them is a matter primarily belonging to the courts of the State, and the national tribunals universally follow their rulings, except in cases where it is claimed that some right protected by the Federal Constitution has been invaded."

The ruling of the Comptroller in the cases at bar on the question of the evidence before him, therefore, presents no Federal question. This court will not interfere to review findings of fact or the conclusions of assessing officers as to the value of property sought to be assessed.

In Kelly *vs.* Pittsburgh, 104 U. S., 78, Mr. Justice Miller said:

> "It is alleged, and probably with truth, that the estimate of the value of the land for taxation is very greatly in excess of its true value. Whether this be true or not, we cannot here inquire. We have so often decided that we cannot review and correct the errors and mistakes of the State tribunals on that subject that it is only necessary to refer to those decisions without a restatement of the argument on which they rest. State Railroad Tax Cases, 92 U. S., 575; Kennard *v.* Louisiana, *id.*, 480; Davidson *v.* New Orleans, 96 *id.*, 97; Kirtland *v.* Hotchkiss, 100 *id.*, 491; Missouri *v.* Lewis, 101 *id.*, 22; National Bank *v.* Kimball, 103 *id.*, 732."

It must be clear, therefore, that under the statute above referred to the State of New York does not tax any of the tangible property of the relator, but its tangible property within the State is appraised for the purpose of arriving at a basis by which the proper amount of tax shall be placed upon the relator's franchise given to it by the State, and which enables it to be a body corporate and to continue so to be and do business and employ capital for the purposes of the exercise of its corporate functions.

In the case of a foreign corporation another rule prevails in the State of New York. A foreign corporation seeks to

transact its business within the State of New York, as a body corporate, and that right is given to the foreign corporation and the basis of the taxation of the foreign corporation is the actual or tangible property which it, the foreign corporation, uses continuously within the borders of the State of New York.

This principle is well illustrated in the case of The State of New York *ex rel.* Pennsylvania Railroad Company *vs.* Knight (192 U. S., p. 21). The relator was a foreign corporation. Its cab service from its station in New York city was rendered wholly within the State. It was an independent, local service, preliminary or subsequent to any interstate transportation, and therefore the judgment of the Supreme Court of the State of New York was correct, and was by this court affirmed.

If the cab service had been from New York city by ferry to various points in Jersey City, an entirely different principle would have obtained, and cabs being then engaged in interstate commerce would not have been properly taken into consideration as a basis of determining the amount of the tax upon the Pennsylvania Railroad Company within the State of New York.

The same principle is found in the case of The Delaware, Lackawanna and Western Railroad Company *vs.* Pennsylvania (198 U. S., 341). The coal which had been shipped by the Delaware, Lackawanna and Western Railroad Company to New York city and piled there for sale was property of the Lackawanna Railroad Company permanently without the State of Pennsylvania. This could not be taken into consideration by that State in fixing the tax upon the tangible property of the railroad company, because the property was outside of the territorial jurisdiction of that State; and in the recent decision in the case of Union Refrigerator Transit Company *vs.* Commonwealth of Kentucky, decided in this court at the October term, 1905, this court says:

> "Both this court and the Supreme Court of Pennsylvania are agreed in the general proposition that

> tangible property *permanently* outside of the State and having no situs within the State, could not be taxed. However temporary the stay of the coal might be in the particular foreign State where it was resting at the time of the appraising it was *definitely and forever beyond the jurisdiction of Pennsylvania*, and it was within the jurisdiction of the foreign State for the purpose of taxation, and in truth it was there taxed."

Again, Justice Brown says in his opinion in the above case:

> "We have ourselves held in a number of cases that such property *permanently* located in a State other than that of its owner, is taxable there."

In the case of Union Refrigerator Transit Company *vs.* Commonwealth of Kentucky, by reference to the decision in the Supreme Court of Kentucky, to be found at page 491, Southwestern Reporter, page 80, it will appear that there was a statute in Kentucky providing for the taxation of all the real and personal estate within the State and of all corporations organized under the laws of the State, *whether the property be in or out of the State, including intangible property*, which shall be considered and estimated in fixing the value of the corporate franchise, as hereinafter provided.

It will also appear by an examination of that case that the tax in question was not a tax upon the franchise of the Union Refrigerator Transit Company, but upon *specific property*, to wit, refrigerating cars, and it will appear that the trial was had before the county court of Jefferson county, Kentucky, and it was found as a fact that the Refrigerator Company owned 2,000 refrigerating cars of the value of $200 each, and a judgment of the County Court was rendered requiring the Refrigerator Transit Company to list such a portion of its cars as under a system of average was shown to be used in the State of Kentucky during the fiscal year, and the remainder were held not to be subject to taxation in that State.

It was from this judgment an appeal was taken to the

Supreme Court of Kentucky and the judgment reversed, and the Refrigerator Company required to list its entire 2,000 cars to be subjected to taxation within the State of Kentucky, and it was from this judgment the appeal was taken to the Supreme Court of the United States, and this court was careful to say at the close of the opinion by Justice Brown:

> "We are of the opinion that the cars in question, so far as they were located and employed in other states than Kentucky, were not subject to the taxing power of that commonwealth."

The theory, however, upon which the prevailing opinion of the court proceeds is found in the opinion, in which a majority of this court concur; Justice Brown says:

> "Not only is the operation of State laws limited to persons and property within the boundaries of the State, but property which is *wholly and exclusively* within the jurisdiction of another State, receives none of the protection for which the tax is supposed to be the compensation."

Applying these principles to the case at bar, it will be conceded on the part of the plaintiff in error that *all* of its freight equipment is for a considerable portion of the year within the State of New York; that even upon the tables showing the car movements, above referred to, the identical cars themselves were within the State of New York for a period of nearly eight months of the year,—and, as claimed by the appellant, that was fairly illustrative of its car movements,—then for at least eight months of the year all of its rolling stock was within the taxing State and receiving the protection *"for which the tax is supposed to be the compensation."*

As further illustrating the system of average contended for by the learned counsel for the appellant, let us suppose that the railroad owned four dining cars, that they were located at Albany, N. Y., where they receive their supplies,

and were used in making daily trips from Albany to Boston, not for the carrying of passengers or transporting of passengers between the States, but simply for the purpose of supplying meals to the passengers en route; that two cars left Boston each day for Albany, and two cars left Albany each day for Boston, and that was their business every day in the year; that these cars were of the value of $10,000 each. Now, if we understand the argument of the relator correctly on the question of average, the Comptroller would be obliged to determine, in fixing the value of these four cars, that but two of them could enter into the computation, because at least two are continuously without the State of New York.

We respectfully submit that such a determination is entirely erroneous in any construction of the section of the Tax Law under consideration, or in any construction of the Federal Constitution.

Now, it is true that in the State of New York it has been determined in such cases as People *ex rel.* Mutual Trust Company *vs.* Miller (177 N. Y., 51) and other cases that when a corporation was organized during the year covering the tax period it should not be taxed for the entire year, but only such proportion of the year as the number of months beginning with the date of its incorporation, and ending with October 31st, the end of the tax year, bore to the entire taxation for the whole year. In other words, so many twelfths of the entire tax as were represented by the number of months beginning with the date of its incorporation to the date of the tax period.

It is also true that in such cases as People *ex rel.* N. E. Loan Co. *vs.* Roberts, which was affirmed without opinion in the Court of Appeals (156 N. Y., 688), that in ascertaining the amount of property of a foreign corporation employed within the State of New York the Comptroller may take into consideration the average balance of the bank account during the tax period, as well as the amount paid

for salaries and services and office expenses, and where it is a corporation which deals in securities the average amount of securities held by the corporation and used in the State should be considered for the purpose of arriving at the amount of the capital of the corporation employed within the State of New York. As the court said in the above case:

> "The capital of a *foreign* corporation employed within the State, is represented by the actual value of its property within the State, whether in money, or goods, or other tangible things."

In The Commonwealth *vs.* American Dredging Company (122 Pennsylvania, 386) the dredging company was assessed upon its franchise in the State of Pennsylvania, and the Auditor General and State Treasurer, the officers authorized under the statute to make the assessment, took into account $92,000 of the property of the dredging company, which was invested in four dredges, a tugboat and eleven scows, and treated that item as property without the State, and made a deduction from the capital stock of the company in the State of Pennsylvania to the extent of the above items with others. An appeal was taken from this determination by the Attorney General of Pennsylvania, and the Supreme Court in reversing the determination of the Auditor General and the State Treasurer, in giving to the dredging company the allowance of $92,000 for the above items, said:

> "It must be conceded that the property in question must be liable to taxation in some jurisdiction. If it were *permanently* located in another State it would be liable to taxation there, but the facts show that it is not *permanently* located out of the State. From the nature of the business it is in one place today and in another tomorrow, and hence not taxable in the jurisdiction where temporarily employed. The rule as to vessels engaged in foreign or interstate commerce, is that their *situs* for the purpose of taxation is their home port of registry, or the residence of their owner

if unregistered. These vessels, if they may be so called, were not registered, hence their *situs* for taxation is the domicile of the owner. This rule must prevail in the absence of anything to show that they are *permanently* located in any State as to be liable to taxation under the laws of that State."

III.

It is respectfully submitted that no Federal question is presented in the several cases under review.

First. Because this court will not interfere with a question of fact, however erroneously it may have been determined by the trial court. (In this case the trial court was the Comptroller of the State of New York.)

Second. The State of New York makes no claim to tax any of the property of the plaintiff in error which is shown to have been permanently or continuously without the State of New York during the tax period.

Third. The statute under consideration does not purport to, nor has the determination of the Comptroller of the State of New York taken any of the property of the relator without due process of law:

(*a.*) For the reason that the plaintiff in error had opportunity to be heard upon the amount of the assessment before the Comptroller.

(*b.*) Because the plaintiff in error had the right to a writ of certiorari to review the determination of the Comptroller, and pursued that right through the courts of the State of New York.

Fourth. The plaintiff in error has equal protection under the law for the reason that all corporations within the State

of New York similarly situated to the plaintiff in error are required by the same section of the statute to share in the burdens of the State to the extent of the value of the property employed by it within the State of New York.

Fifth. It is respectfully submitted that the action of the courts of the State of New York should be affirmed and the several writs of error dismissed.

JULIUS M. MAYER,
Attorney General of the State of New York.
HORACE MCGUIRE,
Deputy Attorney General.

Supreme Court of the United States.

Nos. 81, 82, 586, 587, 588.—October Term, 1905.

Nos. 81 and 82. The People of the State of New York upon the relation of The New York Central and Hudson River Railroad Company, Plaintiff in Error, vs. Nathan L. Miller, as Comptroller of the State of New York.	In Error to the Supreme Court of the State of New York.
Nos. 586, 587, 588. Same vs. Otto Kelsey, as Comptroller of the State of New York.	In Error to the Court of Appeals of the State of New York.

[May 28, 1906.]

Mr. Justice Holmes delivered the opinion of the Court.

These cases arise upon writs of certiorari, issued under the State law and addressed to the State Comptroller for the time being, to revise taxes imposed upon the relator for the years 1900, 1901, 1902, 1903 and 1904, respectively. The tax was levied under New York Laws of 1896, c. 908, § 182, which, so far as material, is as follows: "Franchise Tax on Corporations.—Every corporation . . . incorporated . . . under . . . law in this State, shall pay to the State Treasurer annually, an annual tax to be computed upon the basis of the amount of its capital stock employed within this State and upon each dollar of such amount," at a certain rate, if the dividends amount to six per cent or more upon the par value of such capital stock. "If such dividend or dividends amount to less than six per centum on the par value of the capital stock, [as was the case with the relator,] the tax shall be at the rate of one and one-half mills upon such portion of the capital stock at par as the amount of capital employed within this State bears to the entire capital of the corporation." It is provided further by the same section that every foreign corporation, &c., "shall pay a like tax for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this State, to be computed upon the basis of the capital employed by it within this State."

The relator is a New York corporation owning or hiring lines without as well as within the State, having arrangements with other carriers for through transportation, routing and rating, and sending its cars to points

without as well as within the State, and over other lines as well as its own. The cars often are out of the relator's possession for some time, and may be transferred to many roads successively, and even may be used by other roads for their own independent business, before they return to the relator or the State. In short, by the familiar course of railroad business a considerable proportion of the relator's cars constantly is out of the State, and on this ground the relator contended that that proportion should be deducted from its entire capital, in order to find the capital stock employed within the State. This contention the Comptroller disallowed.

The writ of certiorari in the earliest case, No. 81, with the return setting forth the proceedings of the Comptroller, Knight, and the evidence given before him, was heard by the Appellate Division of the Supreme Court, and a reduction of the amount of the tax was ordered. 75 App. Div. 169. On appeal the Court of Appeals ordered the proceedings to be remitted to the Comptroller, to the end that further evidence might be taken upon the question whether any of the relator's rolling stock was used exclusively outside of the State, with directions that if it should be found that such was the fact the amount of the rolling stock so used should be deducted. 173 N. Y. 255. On rehearing of No. 81 and with it No. 82, before the Comptroller, now Miller, no evidence was offered to prove that any of the relator's cars or engines were used continuously and exclusively outside of the State during the whole tax year. In the later cases it was admitted that no substantial amount of the equipment was so used during the similar period. But in all of them evidence was offered of the movements of particular cars, to illustrate the transfers which they went through before they returned, as has been stated, evidence of the relator's road mileage outside and inside of the State, and also evidence of the car mileage outside and inside of the State, in order to show, on one footing or the other, that a certain proportion of cars, although not the same cars, was continuously without the State during the whole tax year. The Comptroller refused to make any reduction of the tax, and the case being taken up again, his refusal was affirmed by the Appellate Division of the Supreme Court and by the Court of Appeals on the authority of the former decision. 89 App. Div. 127. 177 N. Y. 124. The later cases took substantially the same course. The relator saved the questions whether the statute as construed was not contrary to Article 1, § 8, of the Constitution of the United States, as to commerce among the States; Article 1, § 10, against impairing the obligation of contracts; Article 4, § 1, as to giving full faith and credit to the public acts of other States; and the Fourteenth Amendment. It took out writs of error and brought the cases here.

The argument for the relator had woven through it suggestions which only tended to show that the construction of the New York statute by the Court of Appeals was wrong. Of course if the statute as construed is valid

under the Constitution, we are bound by the construction given to it by the State Court. In this case we are to assume that the statute purports and intends to allow no deduction from the capital stock taken as the basis of the tax, unless some specific portion of the corporate property is outside of the State during the whole tax year. We must assume, further, that no part of the corporate property in question was outside of the State during the whole tax year. The proposition really was conceded, as we have said, and the evidence that was offered had no tendency to prove the contrary. If we are to suppose that the reports offered in evidence were accepted as competent to establish the facts which they set forth, still it would be going a very great way to infer from car mileage the average number or proportion of cars absent from the State. For, as was said by a witness, the reports show only that the cars made so many miles, but it might be ten or it might be fifty cars that made them. Certainly no inference whatever could be drawn that the same cars were absent from the State all the time.

In view of what we have said it is questionable whether the relator has offered evidence enough to open the constitutional objections urged against the tax. But as it cannot be doubted, in view of the well known course of railroad business, that some considerable proportion of the relator's cars always is absent from the State, it would be unsatisfactory to turn the case off with a merely technical answer, and we proceed. The most salient points of the relator's argument are as follows: This tax is not a tax on the franchise to be a corporation, but a tax on the use and exercise of the franchise of transportation. The use of this or any other franchise outside the State cannot be taxed by New York. The car mileage within the State and that upon other lines without the State affords a basis of apportionment of the average total of cars continuously employed by other corporations without the State, and the relator's road mileage within and without the State affords a basis of apportionment of its average total equipment continuously employed by it respectively within and without the State. To tax on the total value within and without is beyond the jurisdiction of the State, a taking of property without due process of law, and an unconstitutional interference with commerce among the States.

A part of this argument we have answered already. But we must go further. We are not curious to inquire exactly what kind of a tax this is to be called. If it can be sustained by the name given to it by the local Courts it must be sustained by us. It is called a franchise tax in the Act, but it is a franchise tax measured by property. A tax very like the present was treated as a tax on the property of the corporation in *Delaware, Lackawanna & Western R. R.* v. *Pennsylvania*, 198 U. S. 341, 353. This seems to be regarded as such a tax by the Court of Appeals in this case. See

People v. *Morgan*, 178 N. Y. 433, 439. If it is a tax on any franchise which the State of New York gave, and the same State could take away, it stands at least no worse. The relator's argument assumes that it must be regarded as a tax of a particular kind, in order to invalidate it, although it might be valid if regarded as the State Court regards it.

Suppose, then, that the State of New York had taxed the property directly, there was nothing to hinder its taxing the whole of it. It is true that it has been decided that property, even of a domestic corporation, cannot be taxed if it is permanently out of the State. *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 201, 211. *Delaware, Lackawanna & Western R. R.* v. *Pennsylvania*, 198 U. S. 341. *Louisville & Jeffersonville Ferry Co.* v. *Kentucky*, 188 U. S. 385. But it has not been decided and it could not be decided that a State may not tax its own corporations for all their property within the State during the tax year, even if every item of that property should be taken successively into another State for a day, a week, or six months, and then brought back. Using the language of domicil, which now so frequently is applied to inanimate things, the state of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign parts. *Ayer & Lord Tie Co.* v. *Kentucky*, May 21, 1906. See also *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 208, 209.

It was suggested that this case is but the complement of *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, and that as there a tax upon a foreign corporation was sustained, levied on such proportion of its capital stock as the miles of track over which its cars were run within the State bore to the whole number of miles over which its cars were run, so here in the domicil of such a corporation there should be an exemption corresponding to the tax held to be lawfully levied elsewhere. But in that case it was found that the "cars used in this State have, during all the time for which tax is charged, been running into, through and out of the State." The same cars were continuously receiving the protection of the State and, therefore it was just that the State should tax a proportion of them. Whether if the same amount of protection had been received in respect of constantly changing cars the same principle would have applied was not decided, and it is not necessary to decide now. In the present case, however, it does not appear that any specific cars or any average of cars was so continuously in any other State as to be taxable there. The absences relied on were not in the course of travel upon fixed routes but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads. Therefore we need not consider either whether there is any necessary parallelism between liability elsewhere and immunity at home.

Judgments affirmed.